

March 14, 2012

Preliminary Report



of the

House Post Audit and Oversight Bureau

Massachusetts House of Representatives

**Fair and Cost Effective – Ensuring an Adequate
Defense While Protecting the Taxpayers;
Review of the Indigent Defense Counsel Program**

In the Massachusetts District and Boston Municipal Courts,
Administrative Office of the Trial Court,
Commonwealth of Massachusetts.

Including:

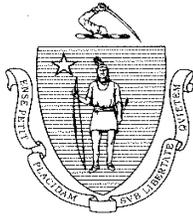
- Efforts at Decriminalization Motion (MGL c 277 s 70C)
- Other Diversion Programs For Certain Misdemeanors
 - Indigency Verification
 - Revenue Reconciliation of Indigency Fee
- New England States/ Other States Indigency Programs

Members of the House Post Audit and Oversight Committee

Representative David P. Linsky, **Chairman**
Representative Benjamin Swan, **Vice Chairman**

Representative Harriett L. Stanley
Representative Bruce J. Ayers
Representative David M. Torrisi
Representative Thomas M. Stanley
Representative Stephen Stat Smith

Representative Jennifer E. Benson
Representative Jonathan Hecht
Representative Sheila C. Harrington
Representative Kevin J. Kuros



The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES
STATE HOUSE, BOSTON 02133-1054

DAVID PAUL LINSKY
REPRESENTATIVE
5TH MIDDLESEX DISTRICT
NATICK - SHERBORN - MILLIS

STATE HOUSE, ROOM 146
TEL. (617) 722-2575
FAX (617) 722-2238
David.Linsky@MAhouse.gov

Committees on:
Chairman, House Committee on
Post Audit & Oversight

March 14, 2012

Citizens and taxpayers of Massachusetts,

On behalf of the House Post Audit and Oversight Committee I am pleased to present to you with the Committee's Report "Fair and Cost-Effective – Ensuring an Adequate Defense While Protecting the Taxpayers; A Review of the Indigent Criminal Defense Program" and the Committee's subsequent recommendations.

After last year's budget debate I began a discussion regarding the amount of funding provided for court-appointed counsel and I instructed the House Post Audit and Oversight Bureau to conduct a review of the indigent defense counsel program. The Commonwealth is appropriating approximately \$200,000,000 of funding to the Committee on Public Counsel Services (CPCS) every year for the purpose of providing court-appointed counsel for criminal defendants. My concern is this appropriation continues to strain the Commonwealth's budget and impacts its ability to provide services in other vital areas.

Providing effective public counsel to those who cannot afford their own is an important right that we work to protect here in the Commonwealth. However, vital funding is being used for appointed counsel on cases where no jail time is being sought by the prosecution. Under the Constitution, the Commonwealth is not legally obligated to provide counsel in those cases. These tens of thousands of cases a year cost the Commonwealth millions of dollars and cause those who are deemed indigent to produce fees which otherwise could have been avoided. Now, more than ever, as we approach another difficult budget in which we are working hard to ensure that government spending is being regulated, we need to look at possible ways to cut excess in order to locate necessary funding to help support so many of the other programs and services on which our citizens depend.

During their review the Bureau discovered that there were inconsistencies with the indigency verification process across the court system. During this review the Probation Department implemented a pilot program into four of its courts which, based on the data collected, has proven to include a more successful set of verification procedures. So far the Probation Four Court Pilot Program finds only 1.15 percent of those claiming indigency at arraignment, are

misrepresenting their income and indigency status. In addition, the Bureau also determined that there were a great number of cases that were being appointed public counsel for single misdemeanor charges, where no jail time was either sought by the prosecution or imposed by the court. In Fiscal Year 2011 (FY11) there were 43,757 misdemeanor crimes charged in which the defendant was being arraigned on a single misdemeanor and which the court appointed counsel. These cases alone cost the Commonwealth \$17,355,893.60 for court-appointed counsel in cases in which incarceration was only a possibility in a few cases.

The Committee presents three recommendations based on these findings, the first of which is to universally implement the pilot system that the Probation Department has implemented in four courts. In order to make the state-wide implementation of this program easier, the Committee proposes some minor statutory changes which are included in this report in "Appendix G". The second recommendation of the Committee is that once the Civil Infraction Commission finishes their review and issues their report, that the legislature implement their recommendations. Our final recommendation is to amend the law relative to the appointment of counsel on misdemeanors in order to cut back on the amount of defendants who will be eligible for appointed counsel and eliminate court-appointed attorneys for those cases in which no incarceration will ever be sought by the prosecution or imposed by the court. Based upon the research that has been collected on the most common misdemeanor offenses in which jail time is rarely being sought, it is the Committee's recommendation that the General Laws be amended to change the presumption on forty-one misdemeanor offenses so that it is presumed that jail time is not being sought by the Commonwealth and therefore there would be less of a need for public counsel. In FY11 alone, had these forty-one types of misdemeanor cases not been appointed public counsel, the Commonwealth could have saved \$3,642,254.00 in single-charge misdemeanor cases alone.

I have included the language of this proposed statutory change which I recommend be incorporated into the FY13 General Appropriations Act. I believe that as we approach another difficult budget year that these recommendations to implement a more efficient indigency verification process combined with the recommendations of the Civil Infraction Commission and the amendment of current misdemeanor crimes could help to save the Commonwealth upwards of \$10 million.

Sincerely,



Chairman David P. Linsky
House Post Audit and Oversight Committee

Representative David Linsky

Suggested Amendment to MGL c211D s 2B

See Appendix E for Current Law

Massachusetts General Laws c 211D s 2B

Chapter 211D Committee for Public Counsel Services

Section 2B Appointment of counsel for criminal defendant charged with misdemeanor or municipal ordinance or bylaw violation

[Text of section added by 2011, 68, Sec. 112 effective July 1, 2011. See 2011, 68, Sec. 221.]

Mr. Linsky of Natick moves to amend the bill by inserting after section XX the following new section:-

SECTION YY. Chapter 211D of General Laws is hereby amended by striking section 2B and inserting in place thereof the following section:-

Section 2B. Notwithstanding any other provision of law, a criminal defendant charged with a misdemeanor or a violation of a municipal ordinance or bylaw, on motion of the Commonwealth, on motion of the defendant, or by the court sua sponte, shall not be appointed counsel if the judge, at arraignment, informs such defendant on the record that, if the defendant is convicted of such offense, his sentence will not include any period of incarceration. For good cause, that judge or another judge of the same court may later revoke such determination on the record and appoint counsel, and on the request such counsel shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial. Any such determination or revocation by a judge shall be endorsed upon the docket of the case.

A criminal defendant charged only with violations of: sections 10, 11, 23, the crimes of operating a motor vehicle negligently or recklessly so as to endanger, leaving the scene of an accident, causing property damage, under section 24 (2)(a), 25, or 34J of chapter 90; sections 34 or 35 of chapter 94C; section 75 of chapter 130; section 34C of chapter 138; section 12 of chapter 140; section 39 of chapter 148; section 218 of chapter 160; section 30 (1), if said property is valued at less than two hundred and fifty dollars, section 30A, clauses (b), (i) and (k) of section 37B, sections 60, if said property is valued at less than two hundred and fifty dollars, sections 87, sections 120, 126A, or 127 of chapter 266, or sections 12, clauses (a) and (b) of sections 53, or clause (a) of sections 53A of chapter 272 shall not be appointed counsel unless said offense requires a mandatory period of incarceration or the Commonwealth notifies the court in writing that it will recommend to the court that the defendant's sentence, if convicted, will include a period of incarceration. Such notice may be filed at any time prior to trial and the court may then appoint counsel, and on the request such counsel shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial.

Fair and Cost Effective – Ensuring an Adequate Defense While Protecting the Taxpayers: Review of the Indigent Defense Counsel Program

In the Massachusetts District and Boston Municipal Courts,
Administrative Office of the Trial Court,
Commonwealth of Massachusetts.

Findings

- Disparity of Data and Lack of Data Make Comparisons Difficult
- Use of Decriminalization Motion of MGL c 277 s 70C Not Extensive
- Other Criminal Court Diversions Used by Prosecutors
- Reliability of Previous Indigent Verification Process Doubtful
- Other States Experience Similar Indigent Defense Counsel Challenges

Committee Recommendations

1. Universally implement the pilot system that the Probation Department has implemented in four courts. In order to make the state-wide implementation of this program easier, the Committee proposes some minor statutory changes which are included in this report in “Appendix G”.
2. Once the Civil Infraction Commission finishes their review and issues their report, that the legislature implement their recommendations.
3. Amend the law relative to the appointment of counsel on misdemeanors in order to cut back on the amount of defendants who will be eligible for appointed counsel and eliminate court-appointed attorneys for those cases in which no incarceration will ever be sought by the prosecution or imposed by the court.
 - Amend the General Laws to change the presumption on forty-one misdemeanor offenses so that it is presumed that jail time is not being sought by the Commonwealth and therefore there would be less of a need for public counsel.

Methodology

The House Post Audit and Oversight (HPAO) Bureau wrote and distributed several survey tools, requested documents and conducted interviews or exchanged correspondence with authorized persons in the Administrative Office of the Trial Court (AOTC), and its District Court and Boston Municipal Court departments; the Office of the Commissioner of Probation; the Massachusetts District Attorneys Association; and the individual District Attorneys offices. The HPAO Bureau also interviewed the chairman and the former general counsel of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts. The Bureau interviewed the chief counsel and the general counsel at The Committee on Public Counsel Services (CPCS) and requested documents from CPCS. The HPAO Bureau also spoke individually to various persons in District and Boston Municipal Courts who contacted the HPAO Bureau upon receipt of the survey research tool distributed by the HPAO Bureau. The HPAO Bureau sought data and/or documents from the Massachusetts Department of Revenue (DOR), the Department of Transitional Assistance (DTA), the Department of Medical Assistance (DMA), and the Registry of Motor Vehicles (RMV) both to determine what means of indigency verification were used either for the Probation department or AOTC, or at their specific agency. The HPAO Bureau was given the management revenue reconciliation reports of the AOTC and after analyzing those reports requested further information from the AOTC, and discussed the reports with the fiscal affairs division of the AOTC. The HPAO Bureau also contacted the Fiscal Affairs Division of the Office of the Secretary of Administration and Finance, and the Massachusetts Comptroller. The HPAO Bureau also discussed the indigent verification program with the Office of the State Auditor. All documents provided to the HPAO Bureau were reviewed and where necessary follow up interviews or questions were made to the particular source of the document, interview, letter, inquiry, or statement. The HPAO Bureau also attended the meetings of the Civil Infractions Commission as an observer. The HPAO Bureau also reviewed the indigent defense council programs of other states including but not limited to the New England region. The HPAO Bureau conducts its performance audit and review based upon the Government Auditing Standards of the United States General Accounting Office.

Sections

- 1. Efforts at Decriminalization Motion (MGL c 277 s 70C)**
- 2. Other Diversion Programs for Certain Misdemeanors**
- 3. Indigency Verification**
- 4. Indigency Fee Revenue Reconciliation**
- 5. New England States/ Other States Indigency Programs**

Appendices/Attachments

A- Review of AOTC Revenue Reconciliation Reports for Indigent Defense Counsel Fees: FY09, FY10, FY11

B- Charges Amended to Civil Complaints under MGL c 277 s 70C for Calendar Year 2010

C- Flow Chart regarding Massachusetts Indigency Verification Process draft copy by Kennedy School of Government for Office of the Commissioner of Probation

D- 2004 Commissioner of Probation: Interim Indigency Verification Protocol Change; 1990 AOTC on Indigency Fee Collection

E- Massachusetts General Laws Chapter 211D s 2A and 2B, Committee for Public Counsel Services

F- 188 Single Misdemeanor Charges and Each Misdemeanor Charge Cost, FY 2011

G- Commissioner of Probation Suggested statutory changes

Commentary following appendices - Letter, Commissioner of Probation
--

Table of Contents

Section One: Efforts at Decriminalization Motion (MGL c 277 s 70C) Page 1
--

Use of the Decriminalization Motion of MGL c. 277 s. 70C is Not Extensive

**Indigent Defense Counsel Provisions
Systemic Problem, Not Limited to a Single Concern** Page 2

**Other Diversion Programs Utilized:
Pilot Programs, as Recommend in 2005 Needed:** Page 2

**Probation Verification
Pilot Program Underway:** Page 2

Motion for Civil Infractions Statistics Page 4

Massachusetts Sentencing Commission Pamphlet Page 5

**Clarification Requests Made of AOTC:
Single Charges versus Multiple Charges;** Page 11

Clarification Requests Made of AOTC: Page 13

**Comparative Analysis
“Disorderly Conduct/Disturbing the Peace” by County** Page 14

Massachusetts Civil Infractions Commission Page 18

Pilot Programs Page 18

Section Two:

**District Attorneys and MGL c 277 s 70C
Decriminalization and Diversion**

Page 20

Survey of the District Attorneys Regarding MGL c 277 s 70C

Page 20

Decriminalization and Diversion

Page 20

**MGL c 218 s 35A Provision:
Ability of a Police Officer to:
Issue Citation and Offer Clerk Hearing**

Page 20

Pre-trial Community Service Diversion Program

Page 21

Non-qualifying Misdemeanors Make
• Also: Issue of Single and Multiple Charges

Page 22

**No Record of Defense Counsel Ever Moving to
Convert a Criminal Offense to a Civil Infraction**

Page 25

“Case management system...does not provide sufficient information”

- Data Systems Issue in Some DA Offices

MULTIPLE PAGES

Section Three:

Indigency Verification

Determining a Person's Poverty

Page 27

Audit Difficult if Not Impossible

Page 27

The Cost of Constitutional Rights

Page 28

Verifying the Earnings and Asset Status of Offenders Applications

Page 30

Verification of Verification

Page 31

Indigency and Interagency Service Agreements Required by Statute; Only One of Four Operational

Page 31

- The Department of Transitional Assistance (DTA)
- Department of Medical Assistance (DMA)
- Registry of Motor Vehicles (RMV)
- Department of Revenue (DOR)

Department of Revenue (DOR) Explains Its Role

Page 32

Commissioner of Probation Explains Its Role

Page 33

Indigent Verification Statistics Flawed High Misrepresentation 'Yield' Not Expected

Page 35

Four Court Findings on Indigency Misrepresentation

Page 37

Governor's House One Proposal: Indigent Defense Counsel Reform

Page 38

**Prosecutors Indicate
Need for Indigent Verification** Page 40

**Questionable Claims of Cost Savings for
Misrepresented Indigency** Page 42

- **Claim as Much as 15 Percent of Applicants Invalid**
- **Department of Transitional Assistance (DTA) Model**
- **Fiscal Affairs Division; Source of Claim**

Fiscal Affairs Division Queried; Estimates Questioned Page 43

**Recommendation:
Expand Pilot Program into All Courts** Page 45

Section Four:

AOTC Revenue Reconciliation Reports

Page 46

(FY 2009 through FY 2011)

Smallest Criminal Caseload District Court Recorded More Indigent Fee Revenue than Courts Much Larger;

Page 46

- A13 (601 average criminal cases) reported: \$20,580.00
- A19 (7,004 average criminal cases) reported: \$8,070.00
- A11 (9,434 average criminal cases) reported: no reported revenue
- A3 (12,360 average criminal cases) reported: negative revenue (\$-1,750.00)

Disproportionate Pattern in Collection of Indigent Fees in District Courts

Page 46

AOTC Revenue Reconciliation Disparity

Page 51

Section Five:

Indigent Defense Legal Services - Public Defender Functions

Connecticut – Maine – New Hampshire – Rhode Island – Vermont Page 52

Indigent Defense Legal Services - Public Defender Functions

Georgia - Iowa - Michigan - North Carolina - Oklahoma – Texas Page 57

Endnotes

Appendices/Attachments (A, B, C, D, E, F, G)

Commentary Following Appendices- Letter, Commissioner of Probation

Brief Synopsis of the Findings of This Preliminary HPAO Bureau Report:

Disparity of Data and Lack of Data Make Audit Difficult to Impossible

For further information see pages: 3, 27, 28, 30- 36, 42, 46 - 50

No single source could provide an adequate assessment of the status of the indigent defense counsel verification provision. Sources used in comparison were often conflicting

For example:

- Verification of income and assets for persons claiming indigency is required by statute and requires that the Commissioner of Probation shall enter into an interagency service agreement with the Massachusetts Department of Revenue (DOR), the Department of Transitional Assistance (DTA), the Department of Medical Assistance (DMA), and the Registry of Motor Vehicles (RMV);
- Only DOR maintained an ISA with Probation and DOR was careful to strictly limit their role in verification; DTA, RMV, Medicaid Office, like DOR were also careful to maintain their distance from indigent verification;
- A 2004 memo from a former Probation Commissioner that allowed a subjective indigent status assessment in each court;
- Revenue reconciliation for AOTC reported instances of zero and negative revenue collection for indigent defense counsel fee;
- No apparent collection effort that approaches the full \$150 for indigent defense counsel base rate;
- Estimates of actual indigent collections based on a fee of \$150 contrast sharply with reports of actual collections of fees in the \$80-\$90 range. If accurate this optimistic outlook and actual revenue collected disparity is guaranteed to produce revenue shortfalls;

Use of Decriminalization Motion of MGL c 277 s 70C Not Extensive

For further information see pages: 4, 5, 8, 9

- 2010 list of 2,932 charges comprised 51 categories of misdemeanor charges. Only 6 of the criminal misdemeanors on the list from 2010 were amended by MGL c 277 s 70C motions in more than 100 instances. Leading the list is “Disorderly Conduct” (838 charges), “Operate (a motor vehicle) after suspension” (646 charges), “Shoplifting” (450 charges), and “Trespassing” (293 charges), “Compulsory Insurance Violation” (152 charges), and “Attaching Wrong MV plates” (111 charges).
- Twenty (20) of the charges were represented by only one instance in District or BMC courts in the entire state of Massachusetts in 2010.

Other Criminal Court Diversions Used by Prosecutors

For further information see pages: 20, 21, 24

Individual District Attorneys noted diversion programs in their offices. These include: “juvenile and adult diversion programs, drug diversion, diversion of juveniles who previously might have been charged with prostitution but whom we treat as victims, and even a Bad Check Restitution program.”

Reliability of Previous Indigent Verification Doubtful

For further information see pages: 18, 34, 36

- “high yield” of indigent applicants who misrepresented their status is questionable;
- The Office of the Commissioner of Probation, responding to the HPAO inquiry, stated that indigent verification process was flawed particularly the tabulation of verifications;
- Week after week “open” cases were not distinguished from the previous week’s indigency verifications; All of Probations’ “open cases” were re-submitted every Sunday night. Consequently, there is no way to accurately tabulate verifications submitted by Probation to DOR and there has been “massive over-counting” of indigent verifications.

- Probation memorandum dated 24 August 2004, and provided to HPAO by Office of the Commissioner of Probation indicated a selective verification of indigency; memo stated that “a Chief Probation Officer, or his or her designee, does not have to request information from the [ISA] agencies on all claims of indigency. The investigating officer may now use his or her discretion, based on his or her experience and training, on when to involve the agencies in the investigation of an indigency claim.”

Revenue Reconciliation Disproportionate; Indigent Fee Collection

Revenue Reconciliation Reports of AOTC reported disparities in indigent fee collection (\$150):
For further information see pages: 46, 50

Revenue Reconciliation Reports time period (FY 2009 through FY 2011) three year average for District and BMC Courts:

Court A13

Three year average number of 601 criminal cases
 Reported a total “\$150 fee” revenue of **\$20,580.00**

Court A19

Three year average number of 7,004 criminal cases
 Reported a total “\$150 fee” revenue of **\$8,070.00**

Court A11

Three year average number of 9,434 criminal cases
 Reported a total “\$150 fee” revenue of **No Reported Revenue**

Court, A3

Three year average number of 12,360 criminal cases
 Reported a total “\$150 fee” revenue of **Negative Revenue (\$-1,750)**

Cost Savings Uncertain and Unknown;

For further information see pages: 18, 35, 37, 42 – 45

- The Fiscal Affairs Division (FAD), Administration and Finance (ANF) Secretariat [in a letter to HPAO] ... assumed that, through an inter-agency agreement that would shift indigency verification activities to an agency such as DTA, approximately 15 percent of CPCS applicants that would otherwise be determined to be eligible...would be found ineligible...ANF projected that up to \$25 million in savings could be achieved on an annualized basis.”
- In fact: the DTA [in a spreadsheet provided to HPAO Bureau] demonstrated that denials for eligibility based on “**earnings and assets**” was only **8.17%** of total applicants for Transitional Aid to Families with Dependent Children (TAFDC) and even fewer DTA applicants were determined ineligible based on “earnings and assets” when the Emergency Aid to Elders, Disabled and Children program (EAEDC) was examined. The EADC denial rate based on “earnings and assets” was 102 denials, or **3.02%**, out of a total of 3,380 cases reviewed.
- Based on the DTA estimate the “yield” of misrepresentation is not 15 percent but just over 8 percent based upon an “earnings and assets” criterion.
- In addition, FAD does not demonstrate a similarity between DTA applicants and indigent defense counsel applicants;
- Current Office of the Commissioner of Probation “four court study” is demonstrating a misrepresentation of indigent status of **just greater than 1 percent**.

Other States Experience Similar Indigent Defense Counsel Concerns.

For further information see pages: 52; 57

Connecticut – Maine – New Hampshire – Rhode Island - Vermont

Georgia - Iowa - Michigan - North Carolina - Oklahoma - Texas

Section 1

MGL c 277 s 70C

UPON ORAL MOTION BY THE COMMONWEALTH OR THE DEFENDANT AT ARRAIGNMENT OR PRETRIAL CONFERENCE, OR UPON THE COURT'S OWN MOTION AT ANY TIME, THE COURT MAY, UNLESS THE COMMONWEALTH OBJECTS, IN WRITING, STATING THE REASONS FOR SUCH OBJECTION, TREAT A VIOLATION OF A MUNICIPAL ORDINANCE, OR BY-LAW OR A MISDEMEANOR OFFENSE AS A CIVIL INFRACTION. . . IF A MOTION TO PROCEED CIVILLY IS ALLOWED, THE COURT SHALL NOT APPOINT COUNSEL. IF COUNSEL HAS ALREADY BEEN APPOINTED, THE COURT SHALL REVOKE THE APPOINTMENT. . .

MGL c 277 s 70C

THE ULTIMATE ISSUE . . . IS TO MAKE RECOMMENDATIONS TO ENSURE THAT THE COMMONWEALTH OF MASSACHUSETTS IS MEETING ITS CONSTITUTIONAL DUTY TO PROVIDE COUNSEL TO INDIGENT PERSONS IN THE MOST EFFICIENT AND EFFECTIVE MANNER.¹

Report of the Commission
to Study the Provision of Counsel
to Indigent Persons in Massachusetts

In pursuit of the efficient delivery of constitutional protections to benefit the accused and the taxpayer, the House Post Audit and Oversight (HPAO) Committee asked its Bureau to inquire into the frequency of use of a provision of the Massachusetts General Law - MGL c 277 s 70C - which allows a decriminalization motion for certain misdemeanors, removes the possibility of a penalty of incarceration from the misdemeanor or misdemeanor amended to a civil infraction, and therefore avoids the appointment of a state paid defense counsel for persons who successfully apply for indigent status. Massachusetts allows bona fide indigent individuals a state paid defense counsel for crimes that include incarceration as a possible penalty.

The Committee also asked its Bureau to be alert to other forms of diversion from criminal court proceedings which would protect the constitutional rights of indigent individuals accused of a crime when the penalty for a conviction might include incarceration.

The HPAO Committee further instructed its Bureau to gather information on indigent verification, indigent verification re-checks, and the incidence of fraud in the claiming of indigency as well as any identifiable efficiency which might be found through a review of the Massachusetts indigent defense counsel program. In addition, the HPAO Committee requested that its Bureau observe the proceedings of the Massachusetts Civil Infractions Commission.

The Issue of Indigent Defense Counsel

In 2005, “The Report of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts”, or as it is more usually known, the Rogers Report, explained that both Massachusetts Supreme Judicial Court in a general rule of that court (1959) and several years later the United States Supreme Court in a landmark decision, Gideon versus Wainwright, (1963) ordered the provision of defense counsel to persons who are indigent –without appreciable material assets – as a constitutional protection afforded to both state and federal criminal defendants who are faced with the potential penalty of jail upon conviction in a criminal case. “States vary in the application of this constitutional standard and Massachusetts provides counsel for defendants in criminal matters where incarceration is possible,” according to the Massachusetts Sentencing Commission.²

Use of the Decriminalization Motion of MGL c. 277 s. 70C is Not Extensive

After a lengthy examination of documents, analyses, and interviews with principals and participants of the Massachusetts judicial system, the HPAO Bureau reports to its Committee that the use of the decriminalization motion of MGL c. 277 s. 70C is not extensive.

However, the HPAO Bureau cautions the Committee that the limited use of the decriminalization motion belies the intricacy of all diversions from the Massachusetts criminal justice and judicial systems and distorts the circumstances that defendants, judges, prosecutors, defense counsel, and law enforcement generally face in the adjudication of crime. The statistics can be misleading, and it is worthwhile to review the intricacies and the tools to deal with those intricacies so as to comprehend the sheer scope of the criminal justice system’s costs, and the obstacles to satisfactorily contain those costs, while providing access to Constitutional rights.

In its examination of some of the features of the indigent defense counsel program in the District and Boston Municipal (BMC) courts the HPAO Bureau found a systemic and long standing problem of undependable data, questionable verifications, revenue disparities, and a general indication that the indigent defense counsel program is in need of specific changes. This report to the House Post Audit and Oversight Committee addresses, preliminarily, some of the indigent defense counsel program’s damaged components.

The HPAO Bureau believes that targeted pilot programs with defined protocols and anticipated and measurable results are the most useful tool to cost containment. Pilot programs were the choice of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts but they were never conducted. Specific alteration of misdemeanor penalties, as well as the penalty reduction to civil infractions with fines rather than incarceration, also holds promise; but that decision requires a careful case by case consideration. That is, in part, the role of the Civil Infractions Commission and that study is underway as this preliminary report is produced.³

MGL c 277 s 70C allows judges, defendants, defense attorneys, and prosecutors use of a motion to reduce a criminal charge to a civil infraction, if accepted by the court and not objected to by the prosecutor in writing (who can also make the motion). This motion avoids the appointment of a state paid defense counsel for persons who successfully apply for indigent status. The HPAO Committee asked its Bureau to examine the frequency of use of the MGL c 277 s 70C decriminalization motion as it affected indigent defense counsel status. In the course of the examination, one prosecutor noted to the HPAO that there is not a single known case or even anecdote of a defendant ever utilizing this provision of MGL c 277 s 70C in that prosecutor's district. This HPAO Bureau report contains a separate section dedicated to the responses of the District Attorneys of Massachusetts regarding MGL c 277 s 70C.

Surveys to the Massachusetts District and Boston Municipal Courts

As a means to obtain the statistical information regarding the application of MGL c 277 s 70C the HPAO Bureau composed and distributed a survey response instrument to the 62 Massachusetts District Courts and eight Boston Municipal Courts inquiring about the use of this motion in their court.

Shortly after the distribution of the HPAO survey, the Massachusetts District Court chief justice and the Boston Municipal Court chief justice and the chairman of the HPAO Committee agreed to have the Administrative Office of The Trial Court, or AOTC, assemble the statistics and data for the HPAO Bureau's survey rather than collect individual statistics from the District and Boston Municipal Courts.

The Chief Justice of Administration and Management, the Chief Justice of the District Court and the Chief Justice of the Boston Municipal Court committed to open and transparent cooperation and effort in responding to the inquiries regarding indigent defense counsel issues by the HPAO Committee and its Bureau. That cooperative effort by the AOTC was fulfilled to the point of releasing information to the Committee which exhibited the numerous difficulties of a data and statistic conversion from a "legacy" automated management system to a comprehensive automated management system for the entire AOTC and its seven departments, and the presence of disproportionate revenue reconciliation data. A "legacy" system is an automated electronic structure which was operational when implemented but which is made obsolete by technological progress and must be converted, revised and/or replaced.

The District Courts and the Boston Municipal Courts are two of seven departments of the Administrative Office of the Trial Court. The HPAO Bureau information request concerned indigency defense counsel operations in each state District Court and the divisions of the Boston Municipal Court. The large volume of indigent defense counsel are primarily in District and Boston Municipal courts, the HPAO Bureau has been consistently advised in interviews and through examined documents. Prior to the decision to have the AOTC assemble the data, and the arrival of that information, the HPAO Bureau received some communications from both clerks and judges of the various Courts regarding the data requested by the HPAO Committee.⁴

In its information request, the HPAO Bureau sought specific information on a civil infraction motion (MGL c. 277 s 70C), especially how often that motion had been utilized by prosecutors. The HPAO Bureau also requested information on indigent verification, indigent verification re-checks, and the incidence of fraud in the claiming of indigency. These later questions are discussed in other sections of this report and include surveys of the Massachusetts District Attorneys, and the Office of the Commissioner of Probation.

Motion for Civil Infractions Statistics

In early June the AOTC responded to the survey of the Massachusetts District Court and the Boston Municipal Court departments forwarding to the HPAO Bureau statistics which had been, the AOTC said, initially “compiled by the Sentencing Commission for review by the Civil Infraction Commission.” These statistics were provided as a preliminary response to the Bureau’s inquiry, the AOTC advised the Bureau.⁵

Upon receipt and review of these statistics and upon attending and observing the Massachusetts Civil Infractions Commission, the HPAO Bureau further requested the pamphlet of statistics compiled by the Massachusetts Sentencing Commission which was being used by the Civil Infractions Commission. The AOTC supplied that pamphlet to the HPAO Bureau.⁶

The First Statistics on Criminal Misdemeanors Amended to Civil Violations

The preliminary statistics provided to the HPAO Bureau by the AOTC were products of the data developed for the Civil Infractions Commission. This data concerned “... initial statistics for offenses on which charges were amended to civil infractions under c. 277 s. 70C during 2010. ... [and] were compiled by the Sentencing Commission.”⁷

However, the AOTC cautioned the Bureau regarding the statistics that “[b]ecause of the methodology used, we believe that these statistics may be an underestimation of the actual number of cases and we are hoping to implement a more comprehensive effort here.”

This “Charges Amended to Civil Complaints under c. 277 s. 70C,” list of 2,932 charges comprised 51 categories of misdemeanor charges. Only six of the criminal misdemeanors on the list from calendar year 2010 were amended by MGL c 277 s 70C motions in more than 100 instances. The most frequent criminal misdemeanor charges amended to civil violations were

“Disorderly Conduct” (838 charges), “Operate (a motor vehicle) after suspension” (646 charges), “Shoplifting” (450 charges), and “Trespassing” (293 charges), “Compulsory Insurance Violation” (152 charges), and “Attaching Wrong MV plates” (111 charges). The AOTC’s list indicated that 45 other charges that utilized MGL c. 277 s 70C were all used on less than 100 occasions; for example, the charge of “Alcohol, Possession by Minor” (57 charges). Twenty (20) of the charges were represented by only one instance in District or BMC courts in the entire state of Massachusetts in 2010, according to the AOTC list. For example, only one charge of “Vandalism” was amended to a civil infraction in 2010. Similarly, there was one charge of “Common Night Walker” that was amended to a civil infraction, and there was a single case of “Annoying Phone Call” amended from a criminal misdemeanor to a civil violation.⁸

In 16 instances of the 51 categories of misdemeanor offenses using the decriminalizing feature of MGL c 277 s 70C, that amendment motion was used 10 times or less in either the state District Courts or Boston Municipal Courts. Among the 10 times or less use of the decriminalization motion were: charges of “RV on Public Way” amended from criminal misdemeanor to civil infraction 10 times, a charge of “False Report of a Crime” was amended twice throughout the District or Boston Municipal court systems, while charges of “Fireworks” (without further explanation) was amended to a civil infraction five times in Massachusetts in calendar year 2010, according to the AOTC statistics. See Appendix B.

The AOTC indicated that this list and data was preliminary and the HPAO Bureau and the AOTC continued to refine the data.

Massachusetts Sentencing Commission Pamphlet

Two weeks after the preliminary list of criminal misdemeanors amended to civil infractions in 2010, the AOTC provided the HPAO Bureau with The Massachusetts Sentencing Commission pamphlet, (provided to the Civil Infractions Commission) dated February 2011. That pamphlet, outlined the revision to MGL c 277 s 70C in the Acts of 2005 and also a compilation of “information which may be useful in addressing the initial reporting requirements assigned to the Commission...” that compilation included data and narrative on “all violations of the general laws that are currently classified as a misdemeanor.”⁹

The Sentencing Commission pamphlet was composed of two sections; an introduction with definitions, narrative observations and data, and four appendices: Appendix A listed the members of the Civil Infractions Commission; Appendix B consisted of “Selected Offenses from the Felony and Misdemeanor Master Crime List”; “Appendix C” of the Sentencing Commission pamphlet contains “selected misdemeanors not punishable by imprisonment”; and Appendix D contained a series of four statistical tables.

The definitions were particularly instructive to the Bureau. For example, the pamphlet opened the narrative with this observation:

G.L. Chapter 274 s.1 sets forth the definition of misdemeanors and felonies for the Commonwealth, "A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors."

And also:

The designation of behaviors as civil or criminal, felony or misdemeanor can change over time as the legislature amends the general laws. For certain behaviors, the designation as civil or criminal can also be determined in a discretionary manner as the case proceeds through the judicial system.

The several appendices of the pamphlet prepared by the Sentencing Commission "in Response to an Information Request from the Civil Infraction Commission" were:

"Appendix A "contained a list of commission members of the Civil Infractions Commission which was established by "Section 6 of chapter 54 of the acts of 2005 ... to study and analyze the imposition of civil penalties under section 70C. This appendix was not in the copy of the pamphlet that the HPAO Bureau received.

Appendix B was a spread sheet of "Selected Offenses from the Felony and Misdemeanor Master Crime List." This list of 59 pages includes a grid of information the categories of which were the following: "Excluded Under c. 277 s. 70C; Offense Seriousness Level; Notes; Offense Reference; Offense Penalty Reference; Offense; Penalty Type; Staircase Factor; Mand. Time (Mandatory Time); Min H/C (Minimum House of Correction); Max H/C (Maximum House of Correction).

Of interest to the HPAO Bureau in Appendix B were these items from the master crime list grid (see also "Clarification Requests Made of AOTC" (page 10) and discussion of "Appendix C"): "Disorderly Conduct, Subsq. Off" and "Disturbing the Peace, Subsq. Offense" found on page 66 of the pamphlet section entitled: "Felony and Misdemeanor Master Crime List"

"Disorderly Conduct" with 838 charges was the most frequent misdemeanor listed in the earlier statistics provided to the HPAO Bureau as noted above.

The grid for these two offenses after the initial offense included incarceration in a “house of correction,” as a possible penalty, the master crime list for the two offenses included, in part:

Excluded Under c. 277 s. 70C	Offense Seriousness Level	Offense Reference	Offense	Min H/C	Max H/C
No	(1)	c. 272 s. 53(b)	DISORDERLY CONDUCT, SUBSQ. OFF. c. 272 s. 53(b)		6 months
No	(1)	c. 272 s. 53(b)	DISTURBING THE PEACE, SUBSQ. OFF. c. 272 s. 53(b)		6 months

All of the various offenses listed on the master crime list followed the spreadsheet pattern and had a placeholder for each category. This example here (above) is an excerpt and lists an HPAO Bureau selected category for illustration purposes.

“Appendix C” of the Sentencing Commission pamphlet contains “selected Misdemeanors not punishable by imprisonment”. Among these misdemeanors is “Disorderly Conduct” which was amended in mid-2009 to exclude imprisonment (apparently, as noted above, on the first offense) as the pamphlet states; thus, the use of the decriminalization motion of c 277 s 70C for a first offense does not require an appointment of defense counsel for a person with an approved claim of indigency. In a later request of the AOTC, the HPAO Bureau requested that this “Disorderly Conduct” offense be tabulated separately across the Commonwealths courts for an MGL c 277 s 70C motion. The HPAO Bureau requested this action for several reasons. It was first and most often decriminalized on the list of the “Charges Amended to Civil Complaints under c. 277 s. 70C, Charges Arraigned Calendar Year 2010”; the Bureau also wanted to review a charge that would most likely appear in most District or BMC courts and this charge appeared to satisfy that requirement. It was not the perfect choice though because the imprisonment penalty for a first offense was removed at the beginning of FY 2010, according to the pamphlet. Nevertheless, it would demonstrate a statewide measurement of the decriminalization motion allowed under MGL c 277 s. 70C for a common misdemeanor. (See the section that discusses the breakout of the disorderly conduct statistics: “Clarification Requests Made of AOTC:” pg 11.)

Also part of the pamphlet that was forwarded to the HPAO Bureau was “Appendix D.” Appendix D contained a series of four statistical tables. These four tables categorize various aspects of misdemeanors first, by arraignment with the number of charges brought and the lead offense of the charges; second, by “misdemeanor cases arraigned in calendar year 2010 not excluded from MGL c 277 s 70C”; third, by misdemeanor’s of “cases convicted” in fiscal year 2009 by “governing offense”; and fourth, by misdemeanors with sentences that resulted in incarceration in fiscal year 2009 listed by governing offense. The first two tables were tabulated by calendar year; the last two tables were tabulated by fiscal year.

For comparison and demonstration, the HPAO Bureau excerpted selections of Table One of Appendix D that listed several common misdemeanor offenses and the categories indicated whether the charges were single, or multiple. These categories of charges appear in both of the initial statistics provided to the HPAO Bureau.

As noted earlier in correspondence with the AOTC most misdemeanors were single charge offenses. That was more of a general observation though, not a hard and fast rule, and depended upon the particular offense. For example, in the excerpted chart, “Disorderly Conduct”, was almost as likely (40 percent) to be a part of a multiple charge against an offender as it was to be singularly charged. However, trespassing was multiply charged only 23 percent of all offenses in calendar year 2010.

Single Charges versus Multiple Charges

Offense	One Charge	Two or More Charges	Total
All Misdemeanor Incidents	89,012	40,722	129,734
Disorderly Conduct	3,854	2,568	6,422
Trespassing	2,338	673	3,011
Alcohol Possession by a Minor	1,995	293	2,288
Prostitution	760	72	832
Common Nightwalker	182	15	197
Fireworks	15	10	25

Similarly, under **Table Two** which illustrated in “misdemeanor cases arraigned in calendar year 2010 not excluded from MGL c 277 s 70C” the number of cases charged with a particular misdemeanor as the lead offense included:

Offense	One Charge	Two or More Charges	Total
All Misdemeanor incidents not excluded from MGL c 277 s 70C	58,096	22,639	80,735
Disorderly Conduct	3,854	2,568	6,422
Trespassing	2,338	673	3,011
Prostitution	760	72	832
Alcohol Procure for Minor	228	64	292
Common Nightwalker	182	15	197
Fireworks	15	10	25

Table 3 of Appendix D demonstrated “misdemeanor cases convicted in fiscal year 2009 by governing offense” which included:

Offense	Number
Disorderly Conduct	1,940
Trespassing	868
Prostitution	456
Alcohol Possession by a Minor	200
Common Night Walker	53
Fireworks	9

Table 4 listed “misdemeanor cases sentenced to **incarceration** in fiscal year 2009 by governing offense:”

Offense	Number
Disorderly Conduct	385
Trespassing	271
Prostitution	186
Alcohol Possession by a Minor	13
Common Night Walker	20
Fireworks	Nothing listed

In the first part of the pamphlet provided to the HPAO Bureau and assembled at the request of the Civil Infractions Commission, the sentencing commission noted “The [Sentencing] Commission is working with the Massachusetts Sheriffs Association to determine the number of persons incarcerated at the current time for a misdemeanor violation.”

Disparity in Totals of Criminal Misdemeanor Charges

In reviewing the Massachusetts Sentencing Commission pamphlet the HPAO Bureau noticed that the total statistics quoted to the Bureau in early June, and the total statistics quoted in the pamphlet provided to the Massachusetts Civil Infractions Commission, which were attributed to the same source, differed slightly. The Sentencing Commission’s Civil Infractions Commission pamphlet stated:

In reviewing the disposition records of all charges, the Commission worked with MSC and OCP and identified 3,035 charges arraigned in calendar year 2010 which have been disposed of as a civil infraction at this time.¹⁰

While the material supplied to the Bureau in early June, attributed also to “statistics [that] were compiled by the Sentencing Commission for review by the Civil Infraction Commission” identified that total as “all charges amended to civil for the same period [calendar year 2010] as 2,932.”¹¹ See Appendix B.

The HPAO Bureau notes that there is a continued problem of data disparity throughout the indigent defense counsel program.

In noting the disparities, the HPAO Bureau also recognizes that the conversion of automated systems in the seven departments of the Trial Court has had its “challenges” as one official noted, including the need to convert from “legacy” or pre-existing and obsolete automated systems. After its documentary review, aided in large part by the cooperative effort of the Trial Court, the Bureau is persuaded that the AOTC has made a genuine effort to present the data and to refine that data at every instance and as requested by the HPAO Bureau.

The Bureau is aware, and finds in multiple locations not limited to the AOTC, that the need to collect, preserve, display, and utilize data and statistics is a daily and ongoing endeavor. These efforts are hampered by a reduction in agency personnel, who have not been replaced – the trial court personnel rolls have been substantially reduced and not replaced over the last several years by the austerity imposed by the recession, the Bureau was consistently told during interviews. This personnel reduction certainly hampers data collection. In addition, a lack of funds for training of personnel due to the enforced austerity also impedes the AOTC operations. This austerity frustrates the coordinated, and system wide plan for recording indigent defense counsel statistics (including revenues which is dealt with in another section of this report); and the austerity coupled with the in-progress installation of MassCourts obstructs operations throughout the Administrative Office of the Trial Court.

Clarification Requests Made of AOTC: Single Charges versus Multiple Charges; Is Decriminalization an Empty Gesture?

After reviewing the documents “Material Prepared in Response to an Information Request From the Civil Infraction Commission” and “Charges Amended to Civil Complaints under c. 277 s. 70C, Charges Arraigned Calendar Year 2010” the Bureau requested clarification on some of the issues raised in these documents.

One issue regarded a discussion of single and multiple charges. The HPAO Bureau wanted to know how often individuals involved in a single incident were singularly charged and how often an individual involved in a single incident were multiply charged. This matter was outlined in a section of the report for the Civil Infractions Commission entitled: “Determine the number of such arrests which result in charges being filed by a district attorney's office and the percentage of such charges for which the commonwealth sought incarceration”.

The issue of the incidence of single and multiple charges was raised to the HPAO Bureau during the course of the indigent defense inquiry. The charges listed in this Sentencing Commission report consist of statistics gathered from Superior, District and BMC Courts.

The HPAO Bureau wanted to know the AOTC experience with the incidence of single charges – because that would offer an insight into how often the use of the motion for decriminalization under MGL c 277 s. 70C was at least possible. The HPAO Bureau was interested in this item because the Bureau was advised by one letter from prosecutors: “...of the few offenders who might otherwise qualify for decriminalization, many often face companion charges - - e.g., one of the many non-qualifying misdemeanors listed in sec. 70C - - that would make decriminalization an empty gesture.”¹²

The AOTC document (Sentencing Commission pamphlet) appeared to indicate that in the case of misdemeanors, single charges proliferated.

[In calendar year 2010] A total of 193,870 incidents were arraigned in these three court departments.

Of these incidents, 107,447 (or 55.4%) involved a single charge and 86,423 (or 44.6%) involved two or more charges:

- Of the incidents involving one or more felony charges, 28.7% had a single charge and 71.3% had more than one charge; and,
- Of the incidents involving only misdemeanor charges, 68.6% had a single charge and 31.4% had more than one charge.

Felonies are not eligible for amendment to civil infractions by MGL c 277 s 70C.

The Bureau recognizes – as the prosecutors’ statement indicated - that there are certain misdemeanors for which the decriminalization motion is not applicable; the statute explicitly removes certain charges from consideration. However, it is worthwhile to know how often single charges are present as noted in the excerpted statement above and what that indicates to the AOTC.

The AOTC responded that the analysis of the charges had several aspects to consider. First, the AOTC noted a total of “193,870 incidents or cases” in calendar year 2010 of which it further classified these incidents as either principally felonies or misdemeanors. “If the incident had one or more felony charges, then it was considered a felony incident. Only incidents that had all misdemeanor charges were considered misdemeanor incidents.”

And the AOTC stated that: “Reducing charges to incidents was important because of the issue of indigent defense. The defense attorney would be assigned once to represent all of the charges in the incident and eligibility for indigent defense would be established by any one of the charges having the option of imprisonment.”

The AOTC stated that its “...felony incidents are more likely to have multiple charges, misdemeanor incidents were more likely to have a single charge.” and added that “cases in the Superior Court are more likely to involve multiple charges than those in the District Court and Boston Municipal Court.”

The AOTC also cautioned that the identification of single charges to misdemeanors is “...an important issue that the impact of modifying the treatment of any particular charge needs to be carefully considered against the overall charging patterns for that offense. It appears then that the issue can be addressed, but it must be thoughtfully addressed with both accurate data and careful application.”¹³

At the request of the HPAO Committee, the CPCS produced case and financial data for fiscal year 2011 regarding single charges and the cost of those charges. The CPCS data which includes the misdemeanor charge description, the total number of cases handled by CPCS in FY 2011, and the total amount paid by CPCS for the specific charge is included as Appendix F.

See Appendix F: 188 Single Misdemeanor Charge and Cost per Charge FY 2011¹⁴

**188 Single Misdemeanor Charges and Each Misdemeanor Charge Cost
FY 2011**

CHARGE DESCRIPTION	Total Cases	\$ Amount Paid
TOTALS	43,757	\$ 17,355,893.60

Clarification Requests Made of AOTC:

In addition to the issue of single charges for misdemeanors, the HPAO Bureau was also interested in obtaining context to the earlier issued document “Charges Amended to Civil Complaints under c. 277 s. 70C, Charges Arraigned Calendar Year 2010.” That document listed 51 categories of charges which had some amending activity from criminal misdemeanor to civil infraction in calendar year 2010. The HPAO Bureau requested that the AOTC provide some context to the decriminalization activity.

In its response the AOTC produced two documents in which the context was refined to break down the statistics of the use of MGL c 277 s 70C by county. Both documents were entitled: “Selected Characteristics of Charges Disposed Pursuant to c. 277 § 70C, District Court and Boston Municipal Court Departments.”

The first document produced data earlier than calendar year 2008. That pre-2008 data is less than reliable because it extracts statistical information from the legacy systems operating in the AOTC. “Of the original 19,458 charges, 17,042 were disposed of from 2008 through June 2011. These cases represent the most systematic compilation of c 277 s 70C dispositions because the transition from the WMS legacy system to MassCourts was complete by 2008. Therefore, the remaining analysis focuses only on those charges resolved from 2008 through June 2011,” the HPAO Bureau was told, which avoided the question of reliability for statistics older than calendar year 2008.¹⁵

Therefore, the HPAO Bureau refined its request to the AOTC and limited the data request to 2008 and later. A second document was provided to the HPAO Bureau also called “Selected Characteristics of Charges Disposed Pursuant to c. 277 § 70C, District Court and Boston Municipal Court Departments” with the data time period of 2008 to June 2011.

For both data requests the HPAO Bureau asked that the use of MGL c 277 s 70C be presented by county. Both documents presented the annual uses of the decriminalization motion by county; the order of the use of the decriminalization motion did not change in either the first submission of data from the AOTC, which included data earlier than 2007, nor the reiterated report for data since 2008. The numeric statistics were slightly lower for the second data issue excepting the numeric statistics for Nantucket, Norfolk, Barnstable, and Dukes, which remained the same.

Comparative Analysis “Disorderly Conduct/Disturbing the Peace” by County

However, for the second data report (2008+) the HPAO Bureau further requested that the AOTC break down a charge of “disorderly conduct” which was listed as the most frequently criminal misdemeanor charge amended to a civil infraction in the initial data submission sent to the HPAO Bureau by the AOTC. That data comprised “statistics compiled by the Sentencing Commission for review by the Civil Infraction Commission.” In responding to that breakdown request the AOTC added a further charge of “disturbing the peace” to the requested “disorderly conducts” data search. See earlier discussion of this choice of charge as the incarceration penalty was removed in FY 2010, altering the appointment of indigent defense counsel possibility for a first offense.¹⁶

The use of the decriminalization motion of MGL c. 277 s. 70C is not extensive.

As noted in this report quoting from the document offered to the HPAO Bureau, “In calendar year 2010 (alone), the [Massachusetts Sentencing] Commission considered a total of 372,880 charges arraigned in the Superior Court, District Court, and Boston Municipal Court. The HPAO Bureau concentrated its examination only on District and BMC courts.”¹⁷

The second AOTC report to the HPAO Bureau listed **the following tabulation of county by county** results between the years 2008 to June 2011 for the use of MGL c 277 s 70C decriminalization motion:

County	
Worcester	6,658
Middlesex	3,603
Hampden	3,580
Hampshire	877
Berkshire	675
Franklin	622
Plymouth	372
Essex	361
Bristol	205
Suffolk	34
Nantucket	17
Norfolk	16
Barnstable	14
Dukes	8
Total	17,042

In a separate section of this report all of the Massachusetts District Attorneys commented on the use of this decriminalization motion and other alternative means to offender court appearances under charges that may require the appointment of indigent defense counsel.

To the HPAO Bureau’s second request, regarding the charge of disorderly conduct, the AOTC provided the following:

For this analysis, the 1,280 dispositions for disorderly conduct and the 654 dispositions for disturbing the peace were combined in order to facilitate a comparison with all criminal arraignments for these offenses. During the period calendar year 2008 through 2010 there were 49,495 arraignments in the District Court Department and Boston Municipal Court Department for disturbing / disorderly (see Table 2). Table 3 shows the county and court division for the 1,934 charges.

Table 2.
 Number of Arraignments and Dispositions under c. 277 § 70C
 for Disturbing the Peace or Disorderly Conduct,
 District Court Department and Boston Municipal Court Department,
 Calendar Years 2008 to 2010³ and 2008 to June 2011

Calendar Year	Arraignments	c. 277 § 70C Dispositions
2008	17,950	121
2009	16,354	513
2010	15,291	830
2011 (to June)	N.R.	470
Total	49,595	1,934

Table 3.
Court Division and County, Disturbing/Disorderly Charges
Disposed Under the Provisions of Chapter 277 § 70C, 2008 to June 2011

County	Court Division	Number	County	Court Division	Number
Berkshire	Northern Berkshire	22	Hampshire	Eastern Hampshire	171
	Pittsfield	78		Northampton	26
	Southern Berkshire	13		Sub-Total	197
	Sub-Total	113	Middlesex	Cambridge	27
Bristol	Attleboro	1		Lowell	17
	New Bedford	13		Marlboro	1
	Taunton	2		Somerville	1
	Sub-Total	16	Sub-Total	46	
Essex	Gloucester	1	Plymouth	Hingham	12
	Lynn	1		Plymouth	41
	Peabody	1		Sub-Total	53
	Salem	15	Worcester	Clinton	11
	Sub-Total	18		Dudley	134
Franklin	Greenfield	147		East Brookfield	23
	Orange	15		Fitchburg	20
	Sub-Total	162		Gardner	30
Hampden	Chicopee	59	Leominster	58	
	Holyoke	174	Milford	23	
	Palmer	27	Uxbridge	45	
	Springfield	115	Westborough	20	
	Westfield	17	Winchendon	9	
	Sub-Total	392	Worcester	564	
Total				Sub-Total	937
					1,934

³ Source: Office of the Commissioner of Probation, District/BMC Court Departments Total Number of Arraignments: Calendar Year 2008 – 2010.

Date: 9/1/2011

As noted above the use of the decriminalization motion against the context of total criminal charges is not extensive. In addition to the county breakdowns for total uses of the decriminalization motion for MGL c 277 s 70C, and the breakdown of two charges often decriminalized by county, namely, “disorderly conduct” and “disturbing the peace”, for context purposes the AOTC also compiled a list of total criminal caseload and charges for District Court and the Boston Municipal Court. The AOTC noted in producing this chart for the HPAO Bureau that “over the five year period, FY 2006 through FY 2010... over one and one-quarter million new criminal cases were filed in the District Court Department and Boston Municipal Court Department.”

**Summary of Criminal Case Filings,
District Court Department and Boston Municipal Court Department
FY 2006 through FY 2010 ¹**

Year	District Court	Boston Municipal Court	Total
FY 2006	224,068	34,742	258,810
FY 2007	233,013	35,537	268,550
FY 2008	233,224	38,531	271,755
FY 2009	219,154	38,179	257,333
FY 2010	200,572	35,251	235,823
Total	1,110,031	182,240	1,292,271

As the reader can see the caseload of the two departments of the trial court is extensive with the state District Court reducing its criminal caseload by nearly 25,000 cases, while the BMC courts remained about the same in their caseloads.

The HPAO Bureau also notes that the statistics on criminal case filings are compiled by fiscal year, while the statistics provided for the use of the decriminalization motion and the specific tally of the use of the decriminalization motion for disorderly conduct and disturbing the peace are provided for calendar years. The calendar year is January to December, while the fiscal year (for the Commonwealth of Massachusetts) is 1 July though and including 30 June.

Comparisons, while generally understood, are not strictly “apples to apples” and caution in comparisons, auditing, and oversight is necessary and proper.

¹ Source: Massachusetts District Court – Summary of Case Filings and Boston Municipal Court Statistics. From <http://www.mass.gov/courts/courtsandjudges/courts/stats/index.html>

Finally, there is one further caution from the AOTC on this analysis of MGL c 277 s 70C, offered to HPAO Bureau as a result of its query of the data regarding the decriminalization motion:

Appointment of Counsel

- There are some considerations that would suggest that it is unlikely that the appointment of public counsel was avoided in all cases in this analysis:
- It is possible that these defendants were not indigent and would not qualify for the appointment of counsel;
- It is possible that the case involved other charges that were not disposed of via Chapter 277 s 70C ; and,
- It is possible that the use of Chapter 277 s 70C occurred after the appointment of counsel.

Massachusetts Civil Infractions Commission

The HPAO Bureau attended the meetings of the Massachusetts Civil Infractions Commission beginning in June 2011.

The Massachusetts Civil Infractions Commission was established pursuant to Section 6 of Chapter 54 of the Acts of 2005, which “established a permanent commission to study and analyze the imposition of civil penalties under section 70C.”

The HPAO Bureau used the booklet compiled for the Civil Infractions Commission as both a research tool and a guide to informing itself. The HPAO Bureau was instructed by the Committee to observe the work of the Civil Infractions Commission, but it was not in any way assigned any other oversight responsibility on behalf of the Committee in regard to the Civil Infractions Commission. The HPAO Bureau’s task to examine the use of MGL c 277 s 70C and certain aspects of the indigent defense counsel at times ran parallel to the work of the Commission. This parallel interest was noted in the minutes of the Civil Infractions Commission: “House Post-Audit and Oversight Committee is engaged in parallel research on reclassification.”¹⁸

Pilot Programs

Pilot programs were the recommendation for possible solutions to the indigent defense counsel cost problem by the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts. However, the pilot programs were never conducted. As this report is produced, the Office of the Commissioner of Probation is undertaking a four court study regarding the tabulation, verification, and efficiency of an individual’s indigent status application. Because of the issues surrounding MassCourts and its final installation, the difficulties of analyzing the

statistics compiled by the AOTC, and the need to contain costs with a realistic proposal (developing a “realistic program” was the most common complaint of the line employees of the judicial system to the HPAO Bureau) the HPAO Bureau believes that targeted pilot programs with defined protocols and anticipated and measurable results are the most useful tool to cost containment.

Section 2

District Attorneys and MGL c 277 s 70C

Survey of the District Attorneys regarding MGL c 277 s 70C

The HPAO Bureau, at the direction of the House Committee on Post Audit and Oversight, polled the 11 District Attorneys of Massachusetts and received a response from each office.

The responses included five individual District Attorneys' responses and a letter from the Massachusetts District Attorneys Association (MDAA) on behalf of six of the 11 District Attorneys of Massachusetts. Those responses addressed the issue of amending a criminal misdemeanor to a civil infraction with the use of MGL c 277 s 70C as well as other means of keeping offenders out of the court system on criminal matters and avoid the potential appointment of a taxpayer funded defense attorney for a person who was granted indigent status and whose offense, if found guilty, could include jail as a possible penalty.¹⁹

Decriminalization and Diversion

Shortly after the survey was distributed to all District Attorneys, the HPAO Bureau received a letter from the Massachusetts District Attorneys Association (MDAA). The MDAA letter sought "to place the role of the civil infractions statute (MGL c 277 s 70C) in context as that statute is the last in a series of filters employed by the police, clerks and prosecutors to divert cases out of the criminal justice system." The MDAA letter also noted that "many of the District Attorneys also do not keep the specific data that you [HPAO] request."²⁰

The MDAA letter recognized that the House and Senate were engaged in a "broad examination" and that the "legislators view the civil infraction statute as a vehicle for cost savings."²¹

Among the diversions that the MDAA identified which occur before arraignment of a defendant were the ability of a police officer under the provision of MGL c 218 s 35A to both issue a citation and offer an offender the opportunity for a hearing before a court clerk. The section of the statute cited allows this hearing to be conducted by either a District Court clerk, Boston Municipal Court clerk, or Juvenile Court clerk.²²

This police/offender referral process which the MDAA letter indicated was an "informal diversion of criminal charges [that] occurs daily in our courthouse" allows the clerk to determine "probable cause" and "weigh an offender's record and the nature of the offense(s)". "And," the MDAA letter continued, the clerk may "notwithstanding probable cause, elect to continue the hearing for a period of time, effectively placing the offender on an informal probation, after which the case is dismissed."²³

The MDAA letter provided no statistics to this type of diversion or "informal probation" stating only that: "This informal diversion of criminal charges occurs daily in our courthouses."

If an offender is not removed from the arraignment process, the MDAA letter stated, and the clerk determines there is “probable cause” as well as “an absence of justification for diversion the case will be scheduled for arraignment. “

If the offender reaches arraignment, the MDAA letter states:

... at this point that the District Attorneys themselves evaluate cases for diversion. All of the District Attorneys operate juvenile diversion programs; some also run youthful offender (under age 21) and/or adult diversion programs. Essex also has an extremely successful pilot drug diversion program. In the last two years alone, these programs have collectively diverted roughly ten thousand offenders away from criminal prosecution. Using CPCS’s FY 2010 data (which reports that the average cost of a criminal case is \$604.51), the District Attorneys’ diversion programs have provided a \$6 million savings to the Commonwealth.

The cost savings diversion mentioned in the above paragraph by the MDAA is based on an assumption of 10,000 diversions multiplied by 604.51 for a total cost savings of \$6,045,100.

In addition to the MDAA letter, individual District Attorneys noted diversion programs in their offices. The Suffolk County District Attorney noted that it operated “juvenile and adult diversion programs, drug diversion, diversion of juveniles who previously might have been charged with prostitution but whom we treat as victims, and even a Bad Check Restitution program. The Bad Check Restitution program alone has diverted more than 3,400 cases over the last three years.”²⁴

The Worcester County District Attorney stated that “Our office utilizes a pre-trial diversion program which allows appropriate offenders the opportunity to avoid a criminal record while giving back to the community in providing structured community service to clean up parks and playgrounds.”²⁵

The Worcester District Attorney said that record keeping was an issue and that office's "case management system... does not provide sufficient information to provide a detailed numeric response" to the HPAO Bureau survey. The HPAO survey polled the District Attorneys for information and statistics including those regarding that number of cases handled and how many offenses were amended from criminal misdemeanors to civil violations. The Worcester District Attorney added that his office planned to train assistant district attorneys to identify appropriate cases for civil treatment and increase utilization of the statute (MGL c 277 s 70C). The AOTC provided statistic breakdowns to the HPAO Bureau (discussed in another section of this report) that indicated that the Worcester District Attorney's office was the most frequent user of this statute (MGL c 277 s 70C) in Massachusetts. See table at the end of this section.²⁶

The Middlesex District Attorney reported that their office was "maintaining our statutory and court-imposed mandates, including our volunteer attorney program, our Juvenile Diversion Program, and our Community Based Justice Program for court involved students."

In a letter to the HPAO Committee Chairman, the chief legal counsel to the Middlesex District Attorney noted that "it is the practice of this office, in cases where it can be confidently shown at arraignment that the Commonwealth will not seek jail time, to have the prosecutor indicate so on the record that the court may refrain from assigning counsel, thereby achieving the cost savings associated with such assignment of counsel... [h]owever ...in many cases, the qualifying misdemeanor is accompanied by a non-qualifying offense (or offenses) and counsel is assigned regardless of whether and when decriminalization occurs."²⁷

The position of the Middlesex District Attorney regarding multiple charges with only one charge eligible for decriminalization was similar to the MDAA letter to HPAO where the Executive Director stated that a "...few offenders who might otherwise qualify for decriminalization, many often face companion charges - - e.g., one of the many non-qualifying misdemeanors listed in sec. 70C - - that would make decriminalization an empty gesture."²⁸

In the section of this report regarding the use of the decriminalization motion of MGL c 277 s 70C, the AOTC statistics indicate that misdemeanors generally tend to be singularly charged. A discussion of the single charge/multiple charge issue can be found on pages 8 and 9.

The Middlesex District Attorney attached two letters sent in 2010 and 2011 to the Senate and House Ways and Means Committees regarding MGL c 277 s 70C satisfying the statute's reporting requirements which require each District Attorney to report to the General Court's Ways and Means Committees. In the letter dated 3 June 2010 the Middlesex District Attorney reported filing for decriminalization in 314 cases "with zero objections" in calendar year 2010. A second attachment (also a letter) dated 8 April 2010 for calendar year 2009 reported that office "filed for decriminalization in 463 cases" and registered three objections to decriminalization motions made under MGL c 277 s 70C.²⁹

These letters to the Ways and Means staff of the Massachusetts General Court from the Middlesex District Attorney also noted a decrease in the “case data” due to decriminalization of small amounts of marijuana in its 2011 letter to the Ways and Means staff. The letter noted:

In reviewing the case data of calendar year 2009 against the data from calendar year 2010 you will notice a decrease. Prior to 2010 the MDAO (Middlesex District Attorney’s Office) often decriminalized by motion possession of small amounts of marijuana and our decriminalization numbers reflected that fact. Following the statutory change that automatically decriminalized the possession of small quantities of marijuana this class of criminal case no longer exists for conduct occurring on December 2008 or later and the decrease in our calendar year 2009 numbers appear to be in part attributable to the marijuana law change.

The Middlesex District Attorney in the letter dated 3 June 2010 and addressed to the budget analysts at the House and Senate Ways and Means Committees stated that decriminalization may offer an opportunity to increase monetary penalties.

When the Commonwealth moves to have a case decriminalized and the court orders such a change, there is an opportunity to attach a civil fine. Specifically, GL c 277 sec 70C states: “When the court has treated a violation of a municipal ordinance or bylaw or misdemeanor offense as a civil infraction under this section..., the court may impose a fine of not more than \$5000...” based upon the 314 decriminalization cases during this reporting period, the court had the opportunity and ability to impose civil fines of up to \$1,570,000.³⁰

The other attached letter dated 14 months earlier and also addressed to the Massachusetts House and Senate Ways and Means Committee stated that the Middlesex District Attorney’s office “filed for decriminalization in 463 cases”. That letter also noted that the “court may impose a fine of not more than \$5,000” and noted too that “based upon the 463 decriminalization cases during this reporting period, the court had the opportunity and ability to impose civil fines of up to \$2,315,000.”³¹

Similarly, the letter from Middlesex District Attorney’s legal counsel quoted the potential revenue expectations in the letter to the HPAO Committee Chairman stating that that MGL c 277 s 70C allowed the court to impose civil fines, with the legal counsel estimating that that fine

imposition could amount to as much as “\$3,885,000 on cases decriminalized in Middlesex County in 2009 and 2010.”

The potential revenue total in both letters to the Ways and Means Committee analysts, and the quote of the aggregate “fine imposition” or revenue of \$3,885,000 in the letter from the Middlesex District Attorney chief legal counsel, to HPAO, were estimated by multiplying the two reported decriminalization case totals noted in the letter from the Middlesex District Attorney (463 and 314 for a total of 777) and multiplying that sum by the stated maximum fine (\$5,000) for the total of “\$3,885,000”. Absent more reliable data, the HPAO Bureau believes that the potential court imposed “fines” revenue suggested in the letters to Ways and Means and to the HPAO Committee tends more toward an optimistic assumption than to a realistic expectation of possible revenue.

The Suffolk County District Attorney also responded individually to the HPAO Committee and its Bureau. In a letter to the HPAO Chairman, the Suffolk District Attorney both concurred with the statements contained in the letter from the MDAA and offered some examples specific to his office.

The Suffolk District Attorney, similar to the Worcester District Attorney’s letter, noted that “some of the specific information you seek [HPAO survey] was not routinely captured in the time period you specified...but those records are being kept now in order to capture our actions in this area.”³²

The Suffolk District Attorney letter stated that the Office has:

...a number of programs that divert cases out of the criminal courtroom, including juvenile and adult diversion programs, drug diversion, diversion of juveniles who previously might have been charged with prostitution but whom we treat as victims, and even a Bad Check Restitution program. The Bad Check Restitution Program alone has diverted more than 3,400 cases of the last three years... There is no appointed counsel, to date we have had no criminal referrals from the program (indicating a high level of compliance), and it operates at zero expense to the taxpayer.³³

The Suffolk District Attorney said that the cases “that do not qualify” for any diversion program “proceed to arraignment” but the “considerations” of the decriminalization statute (MGL c 277 s 70C) was mostly accomplished and satisfied the intent of that statute “namely, to move cases out of the criminal courts and avoid the costs of appointed counsel and further prosecution.”

The Suffolk District Attorney noted that an amendment (2003) to MGL c 277 s 70C

“specifically allow[ed] the defendant to move independently of the Commonwealth to treat a criminal misdemeanor, not specifically excluded by the statutory language, as a civil infraction under the statute. Further, the Court is also empowered to act sua sponte to do so. Only written objection from the Commonwealth can prevent the court amending from criminal to civil... We have no record, or even an anecdotal example of our office objecting to such a motion by the court, nor do we have any record or even anecdotal recollection of defense counsel ever moving to convert a criminal offense to a civil infraction.”³⁴

The Suffolk District Attorney’s office concluded its letter by stating:

A review of our records indicates that since 2008, approximately 20,000 misdemeanor and minor cases have been disposed at an early stage of the proceedings, or entirely diverted from the criminal justice system, without compromising public safety...in a large number of cases the need for appointed counsel has either been eliminated entirely, or at a minimum significantly limited...at significant cost savings and benefits to the tax payer...³⁵

There were no specific cost savings stated, however, the Suffolk District Attorney, like the Worcester District Attorney, noted that there were no record keeping data that was “routinely captured”; similarly the MDAA letter also noted that “many of the District Attorneys also do not keep the specific data that you [HPO] request.” Without the data it is difficult to accurately determine and/or quantify what efficiencies and/or cost savings can be obtained.³⁶

The responses from the District Attorneys in regard to the use of both the decriminalization statute and the other means to avoid the appointment of indigent legal defense counsel were helpful and illuminating as insights into the practical means to avoid costly court proceedings where non-criminal action was an appropriate route and public safety was not, in the view of the prosecution, compromised or threatened. The cost estimates, absent specific data, however, assumed optimistic and unreliable revenue projections. As also noted in other areas of this report, the identification of specific cost savings, and/or the efficiencies require more reliable and consistent statistics; this is a future rather than a present capacity. The AOTC, for example, told the HPO Bureau that MassCourts, the AOTC automated case system, will have a financial collection component and a data operations component. MassCourts, however, is not yet fully operational.

For table below: **Criminal Charges Amended to Civil Infractions – 2011-2008**

Table 1³⁷
Criminal Charges Amended to Civil infractions
Selected Characteristics of Charges Disposed Pursuant to c. 277 § 70C,
District Court and Boston Municipal Court Department,
2008 to June 2011

County

Worcester	6,658
Middlesex	3,603
Hampden	3,580
Hampshire	877
Berkshire	675
Franklin	622
Plymouth	372
Essex	361
Bristol	205
Suffolk	34
Nantucket	17
Norfolk	16
Barnstable	14
Dukes	8
Total	17,042

Disposition

Responsible	16,576
Not Responsible	466
Total	17,042

Section 3

Controlling the Cost of Indigent Defense Counsel

Better Verification of Defendants in District Court Claiming Indigency

There is a constitutional duty to provide counsel to indigent persons. This duty creates the practical need to pay for indigent counsel and provide for all other operational requirements that the judicial system, or any system, requires, as noted in the 2005 “Report of The Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts”, customarily called the Rogers Report. In difficult and tumultuous economies, cost control becomes a more highlighted aspect of operations.³⁸

Indigency Verification

The HPAO Committee asked its Bureau to examine the available data regarding misrepresentation of indigent status in the District Court and Boston Municipal Court departments of the Massachusetts Administrative Office of the Trial Court (AOTC).

Audit Difficult If Not Impossible

The HPAO Bureau’s performance audit and examination of the available data found it impossible to assess or audit the provision of indigent defense counsel because the data was either missing, disparate, conflicting, or voluntarily collected but without continued auditing and oversight. Following an interview with the HPAO Bureau regarding revenue reconciliation reports, the AOTC provided the HPAO Bureau with a 1990 memo proposing categories of indigent fee collection, answering the question of why separate categories of fees were collected.³⁹ The AOTC noted that the separation of indigent fee revenue was voluntarily categorized as either indigent fee, or marginally indigent fee, but this process was not adequately overseen. The other issue, creating disproportionate data representation in the revenue reconciliation reports, was caused in large part both by an inability to train or offer training in the recording of revenue due to budget austerity, and this training inability was exacerbated by a shortage of personnel, coupled with a system-wide conversion and automation of AOTC functions known as MassCourts.

No single source could provide an adequate assessment of the status of the indigent defense counsel verification provision. Sources used in comparison were often conflicting; For example:

- Negative numbers for indigent defense counsel revenue collection;
- A memo from a former Probation Commissioner that allowed a subjective indigent status assessment in every court; these court by court indigent analyses may at least explain the

disparities represented in the revenue reconciliation reports from the AOTC (see Appendix A);

- No apparent collection effort that in any way approaches the full \$150 for indigent defense counsel base rate;
- Estimates of actual indigent collections based on a fee of \$150 contrast sharply with reports of actual collections of fees in the \$80-\$90 range. If accurate this optimistic outlook and actual revenue collected disparity is guaranteed to produce revenue projection shortfalls;
- Accounts receivable function not yet operational in MassCourts automated management system;
- Only DOR maintained an ISA with Probation, and/or AOTC
- DOR was careful to strictly limit their role in verification;
- Despite a statutory provision, there is no ISA with DTA, RMV, or the Office of Medicaid;
- DTA, RMV, Medicaid Office, like DOR were careful to maintain their distance from indigent verification.

The Cost of Constitutional Rights

The cost for indigent defense counsel from FY 2008 through FY 2011 hovers around \$200 million dollars annually. The total expenditures for Fiscal Year 2010 (1 July 2008 – 30 June 2009) by the Committee on Public Counsel Services (CPCS) is \$199,590,001. The fiscal statistics available for FY 2011 increase by \$5 million (to \$205,175,000). This year, the General Appropriation Act provided the Committee on Public Counsel Services with 158,950,073.⁴⁰ This is \$40,639,928 less than the expenditure of funds (\$199,590,001) by the Committee on Public Counsel Services in FY 2010.

Annual Appropriations and Expenditures for CPCS For FY 2009- FY2012 (as of December 2011)⁴¹

	FY 2012	FY 2011	FY 2010	FY 2009
Total Available	\$158,950,073	\$205,175,554	\$201,245,715	\$193,284,490
Expenditures	\$76,792,324	\$197,368,082	\$199,590,001	\$193,104,103

Based on FY 2010 actual spending and absent an extraordinary efficiency it does not appear to the HPAO Bureau that the Committee on Public Counsel Services will be able to complete this year without receiving a supplement to their General Appropriation Act allocation.

The Search for Efficiency in the Provision of Indigent Defense Counsel

The Governor's budget development narrative stated that the escalating cost of CPCS indigent defense counsel "is mainly due to the increases in the hourly billing that is done by the private bar advocates who represent 90% of the annual indigent case load." This increase was also a result of the Lavallee ruling by the Massachusetts Supreme Judicial Court according to the Governor's budget. The increase in indigent defense attorney compensation was recommended by the Rogers' Commission and was authorized by statute. The Rogers Commission noted:

The Supreme Judicial Court declared that the shortage of lawyers in the Hampden County bar advocates program was caused by a low rate of attorney compensation authorized by the annual budget appropriation. The court also stated that there had been "little change" in the hourly rates for private counsel since 1986 and that the rates were "among the lowest in the nation." The court, however, took notice that the "Legislature is keenly aware of the defendants' constitutional right to counsel and of the demands that right makes on the public treasury." Accordingly, the court declined to exercise its inherent powers and did not order judges to authorize compensation rates in excess of what the Legislature had appropriated. Instead, the court focused its decision on formulating a remedy to the "continuing constitutional violation suffered by indigent criminal defendants in the courts of Hampden County."⁴²

The Rogers' report noted that after the Lavallee decision the judiciary urged "cooperation between the legislative, executive, and judicial branches of government in "fashioning a permanent remedy for what can now fairly be seen as a systematic problem of constitutional dimension." The legislature, at that time - 2004 - , funded the bar advocate program for the recommended amount and the then Governor vetoed nearly twenty percent of the appropriation. The Bar Advocates lobbied for a veto override and the legislature delayed an override in anticipation of gubernatorial action on indigent defense reform. The then Administration

suggestions were contentious and neither the bar advocates organization, nor CPCS could reach a suitable agreement with the then Administration. Consequently, the legislature restored the funds vetoed by the governor in a FY 2004 supplemental budget signed by the Governor in April 2005.⁴³

In an interview with the HPAO Bureau, the Chairman of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts (Rogers' Report) said that the commission recommended and the legislature accepted the need for "a reasonable" rate (of compensation for indigent defense attorneys) but not "a great rate." There is no desire to make it a great rate of compensation to represent indigent individuals because that would encourage an "indigent counsel industry" for which there is no interest, the chairman of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts told the HPAO Bureau. At the same time, it has to be a reasonable rate in order to attract a "decent quality" of attorney to serve as an indigent defense counsel, he said.⁴⁴

Current rates were raised by the General Court to \$50/hour for district court cases, \$60/hour for superior court and care and protection cases, and \$100/hour for murder cases. The web site of the Committee on Public Counsel Services lists current rates which range from \$50 through \$100 dollars depending upon the particular offense and the court that has jurisdiction. In documents provided, CPCS pointed out that "The maximum number of billable hours permitted per year is 1,800. Attorneys may not accept new appointments after they bill 1,400 hours in a year. Attorneys may not bill more than 10 hours per day without the special permission of CPCS."⁴⁵

Verifying the Earnings and Asset Status of Offenders Applications

Indigency verification has been required for years. The process is described by statute. The HPAO Bureau inquired of DOR, DTA, RMV and DMA to determine what means of verification were used. The HPAO Bureau also spoke to the Office of the Commissioner of Probation and the Committee on Public Counsel Services (CPCS) regarding verification. In addition, the HPAO Bureau was given the management revenue reconciliation reports of the AOTC and after analyzing those reports requested further information from the AOTC, and interviewed the fiscal affairs director of the AOTC. The HPAO Bureau also contacted the Fiscal Affairs Division of the Office of the Secretary of Administration and Finance, and the Massachusetts Comptroller. All of these contacts provided the HPAO with indigency data.

In the budget recommendations for Fiscal Year 2012, the Governor of the Commonwealth of Massachusetts noted that the indigency verification process was "currently inadequate":

Only those that are eligible should be receiving services from the state, and there are significant concerns about the rigor of the current eligibility determination process. By

increasing the controls of the eligibility determination and re-determination process, it is expected that the department's case load will decrease and the fee collections from people deemed "able to contribute" to the assignment of their counsel will increase.⁴⁶

Verification of Verification

The HPAO Bureau surveyed the Office of the Commissioner of Probation regarding its role in indigency verification.

The verification of income and assets for persons claiming indigency is conducted by the Office of the Commissioner of Probation as required by MGL c 276 s 99E. That statute states in part: "The commissioner of probation shall enter into an interagency service agreement with..." that statute lists the Massachusetts Department of Revenue (DOR), the Department of Transitional Assistance (DTA), the Department of Medical Assistance (DMA), and the Registry of Motor Vehicles (RMV) as the agencies with which the Probation Commissioner "shall enter into an interagency service agreement with... to verify income data and other information relevant to the determination of indigency of recipients of counsel pursuant to section 2 chapter 211D."⁴⁷

In addition to surveying the Office of the Commissioner of Probation, the HPAO Bureau also requested in writing copies of the interagency service agreements that each agency named in the statute had with the Office of the Commissioner of Probation.⁴⁸

Only the Department of Revenue had an in-force agreement with the Commissioner of Probation.

Correspondence from the other three agencies advised the HPAO Bureau as follows:

The Department of Transitional Assistance (DTA)

In its response to the HPAO Bureau, and writing at the request of the DTA Commissioner, the Acting General Counsel of the Department of Transitional Assistance stated that "to the best of my knowledge, the Department of Transitional Assistance does not have any interagency service agreements with the District Court of Massachusetts, the Boston Municipal Court Department, the Massachusetts Office of the Commissioner of Probation or with the Massachusetts Trial Court. Nor does the Department have a process for verifying "indigency" beyond the various eligibility requirements of its public assistance programs."⁴⁹

Department of Medical Assistance (DMA)

The Director of the Office of Medicaid, Executive Office of Health and Human Services, responded to the HPAO Bureau and indicated that “Neither the Commissioner of Probation nor the Massachusetts Trial Court has entered into such an ISA [Interagency Service Agreement] with the Office of Medicaid related to indigency verification... cannot provide you with this ISA or with information regarding statistics or an ‘indigency verification process for the purposes of such an ISA.’”⁵⁰

Registry of Motor Vehicles (RMV)

The Registrar, of the state Registry of Motor Vehicles, advised the HPAO Bureau that she was “not aware of any such ISA [Interagency Service Agreement]... between the Massachusetts Department of Transportation, Registry of Motor Vehicles Division and the Massachusetts Commissioner of Probation or with the Massachusetts Trial Court that are used to determine the ‘indigency’ of recipients of state paid defense counsel.” The Registrar of Motor Vehicles further noted that she had “spoken to the MassDOT [state Department of Transportation] Controller and she is not aware of any ISA between the Registry of Motor Vehicles and the Massachusetts Commissioner of Probation or the Massachusetts Trial Courts.”⁵¹

Department of Revenue (DOR)

The only agency that responded affirmatively to the existence of an interagency service agreement to verify indigent status for a person applying for a court appointed and state paid defense counsel was the Department of Revenue (DOR).

The tax counsel for DOR’s litigation bureau wrote to the HPAO Bureau director on behalf of the DOR Commissioner indicating that the DOR general counsel had recently forwarded a copy of the existing Interagency Service Agreement (ISA) “established between DOR and the Administrative Office of the Trial Court (AOTC) and the Office of the Commissioner of Probation.”

Department of Revenue (DOR) Explains Its Role

Regarding indigent verification, DOR’s tax counsel explained in his letter to the HPAO Bureau that “DOR’s responsibility is limited solely to matching wage reporting files to information provided by AOTC regarding individuals that have claimed indigency....DOR does not conduct reviews of verifications of the information provided...”

DOR receives and processes approximately five electronic [batch] transmissions per month from AOTC, the DOR letter to HPAO Bureau stated.⁵²

DOR's process was explained as follows:

The data match process performed by DOR is automated with very little manual involvement. DOR receives an electronic file from AOTC through CommBridge statewide network. The file contains the names and SSN's of individuals for whom COB [Commissioner of Probation] must verify income status. Upon receipt of the electronic file, DOR downloads the file from the CommBridge server to DOR's Unisys system to perform the data match process. The information provided in the AOTC file is matched against DOR wage reporting files to identify those individuals who are receiving wages and have claimed indigency. An individual is deemed to be positively identified for the purposes of wage reporting if the individual's SSN contained within the AOTC file matches the SSN in DOR's wage reporting files, and a name match is reported under the enhanced matching program. DOR provides the following wage reporting information of only those individuals who have been positively identified: name, SSN, employer name, employer identifying number, and the amount of wages reported for the individual for the last twelve available months or for the total number of months available, if fewer than twelve. DOR returns the matched file to AOTC through the CommBridge statewide network.⁵³

Office of the Commissioner of Probation Explains Its Role

After requesting information from the agencies specifically named in the statute, the HPAO Bureau met with the Commissioner of Probation and members of the Office of the Commissioner of Probation staff. The Bureau had previously surveyed the Commissioner of Probation on topics including: indigency determination, misrepresentation of indigency status, indigency revenue statistics, indigency assessment follow-ups, and indigent defense counsel termination statistics.

The HPAO Bureau told the Commissioner of Probation and the staff that only the Department of Revenue indicated that there was an existing interagency service agreement with the Office of the Commissioner of Probation. The Probation staff indicated that their office has access to an "identity specialist tool" maintained with the Registry of Motor Vehicles; however, that "identity

specialist tool” data only indicated the manufacturer, model, and year of any motor vehicles registered to an indigent defense counsel applicant.

The Office of the Commissioner of Probation said that DOR estimated that there were between 700,000 and 800,000 verifications checked annually by the Office of the Commissioner of Probation. The highest recorded verification for a one year period with DOR was 1.3 million instances. However, there was a possibility that these statistics were multiply counted. The Probation indigency verification is required for every approved applicant in each Superior, District, Boston Municipal, and Juvenile Courts. The verifications are conducted by the chief probation officer of that court or his/her designee.

The HPAO Bureau requested confirmation of the verification process with DOR. The Office of the Commissioner of Probation, after its own inquiry, later stated that in fact the verification process was flawed particularly the tabulation of verifications. The HPAO Bureau was advised that each Sunday evening when the Office of the Commissioner of Probation submitted its verifications to DOR, that submission contained all of the “open” cases in Probation. Thus all of Probations’ “open cases” were re- submitted every Sunday night. These “open” cases were not distinguished from that weeks’ indigency verifications. Consequently, there is no way to accurately tabulate verifications submitted by Probation to DOR and there has been “massive over-counting” of indigent verifications.

The Office of the Commissioner of Probation also noted to the Bureau, and provided documentation, that the previous commissioner had issued a memorandum titled “Interim Indigency Verification Protocol Change”, dated 24 August 2004, regarding a selective verification of indigency in August 2004. In that memorandum, the then Probation Commissioner stated that as of 24 August 2004 to “comply” with the amended MGL. c 211D, s 2 1/2, “a Chief Probation Officer, or his or her designee, does not have to request information from the agencies on all claims of indigency. The investigating officer may now use his or her discretion, based on his or her experience and training, on when to involve the agencies in the investigation of an indigency claim.”⁵⁴

The Interim Indigency Verification Protocol Change memorandum of 2004 notes that “This change does not negate the necessity of having the defendant read and sign the “Definition of Indigency and Acknowledgement of Penalties for Misrepresentations Form and the Waiver Authorizing Release of Information to Verify Claim of Indigency.”⁵⁵

The 2004 memorandum further notes that “Probation Officers should also continue to use past methods of determining indigency when assessing the defendant’s need for counsel.” This last sentence was not explained in the memorandum.⁵⁶

Following the resignation of the Commissioner of Probation on the last day of 2010, an acting commissioner of probation was appointed by the AOTC in early January of 2011. The Office of the Commissioner of Probation provided a list of actions taken since that appointment. Those actions included: train staff in the administering of indigency verification; undertake random compliance checks to determine if the checks were in compliance with the statute and the

expectations of the AOTC; and determine where additional training in verification techniques may be required.⁵⁷

In its General Appropriation Act the Massachusetts General Court introduced new procedures for indigency verification.

The Office of the Commissioner of Probation advised the HPAO Bureau that following the change in the procedure a specific staff person within the Office of the Commissioner of Probation was appointed to “field inquiries regarding the new statute” on indigency verification. In September of 2011 the Office of Commissioner of Probation began regional chief probation meetings throughout the state to “review new statute and related operational questions” and formed a three person team to address “future efforts related to indigency verification.”

In October of 2011 a “four court study” to monitor indigency verification began. The four courts in the project are Middlesex Superior Court, Worcester District Court, Stoughton District Court, and Berkshire Juvenile Court, according to a Probation Commissioner email to the HPAO Bureau.⁵⁸

The purpose of the four court study “is to examine all requests for court-appointed counsel, assess best method(s) for indigency verification, and obtain results in terms of overturned appointments due to misrepresentation. (Courts have been prepared for the study in two preceding months.)” Harvard University’s Kennedy School of Government is conducting the study on behalf of the Office of the Commissioner of Probation (OCP). The study is a class project that benefits both the OCP and Harvard’s Kennedy School Operations Management class. The survey project began in early October, and is scheduled to be completed by the end of 2011. “Preliminary results of the four-court study will be distributed in January, 2012, followed by follow up data from the same courts in the Summer of 2012,” according to the Office of the Commissioner of Probation.⁵⁹ A sample of the flow chart for the indigency verification process is attached as an Appendix C.

In the HPAO Survey of the Office of the Commissioner of Probation, and in the interviews conducted by the HPAO Bureau, the Acting Commissioner of Probation and his staff indicated that a substantial amount of misrepresentation of indigency is unlikely. However, there is a lack of statistical evidence to determine misrepresentation of indigency one way or another.

Indigent Verification Statistics Flawed; High Misrepresentation ‘Yield’ Not Expected

As preceding paragraphs detailed, there was a subjective approach to conducting indigent verifications at least since August of 2004 (and possibly much earlier). Until the most recent efforts within the AOTC and the renewed commitment to collect the data and analyze that data, the evidence of misrepresentation is just not available. Nor were all of the tools mandated by the statute (M.G.L. c 276 s 99E) to test for indigent verification operational. Only DOR had an in force interagency service agreement. The RMV tool – an “identity specialist tool” – simply identified a make, model, and description of a car possibly registered to an indigent applicant.

Further, the role of DOR, as described by the DOR litigation bureau, was extremely limited. Complicating that DOR limited involvement was the inattention to the submission of weekly applications that resulted in a massive over counting of the weekly statistics. The data and statistics needed to assess the indigent verification operations were invalid and unreliable.

In its first meeting with the Acting Commissioner of Probation and his senior staff, the Acting Commissioner did not believe there would be a “high yield” of persons who misrepresented their lack of affluence, and, therefore, misrepresented their ability to afford an attorney to represent them in a court proceeding which could potentially send them to jail if they were found guilty. Since the initial interview with the Office of the Commissioner of Probation, the HPAO Bureau conducted a follow up telephone interview, and then with a face to face review of the Office of Commissioner of Probation’s “Quarterly Indigency Report, July 2011 – September 2011.”

In the telephone interview with the HPAO Bureau, the First Deputy Commissioner of Probation said that now all indigent applicants who are approved for state paid defense counsel are verified. This full verification process has been underway since July 2011. In these three months this process had not found significant amount of misrepresentation of indigent status among approved applicants.⁶⁰

In a quarterly assessment of statistics for July through September 2011 provided to the HPAO Bureau, the tally for total persons “determined indigent” in District Court was 18,915 individuals. Of that number, 194 individuals were found to have misrepresented their financial status. That is one percent of the applicants at District Court. The Office of the Commissioner of Probation is skeptical of the results of the first two months because it was the first full time assessment of indigency conducted by probation officers. However, the Office of the Commissioner of Probation is confident that the September component of the survey is valid and that month’s survey of district courts in Massachusetts found 6,222 offenders who were approved for indigent status, but only 104 of those September approvals were found to have misrepresented their financial status. That number of indigent misrepresentations is about 1.5 percent of the total applicants for state paid indigent defense counsel system wide in the District Court department of the AOTC for the one month period.⁶¹

Indigent Misrepresentation and Verification- District Court

District Court Department	# Indigent	# Found Not Indigent	# Misrepresent Indigency	# No Longer Qualified	# Indigent Verifications	Reduced Indigent Counsel Fee	Average Reduced Counsel Fee⁶²
July 2011	6,111	1,692	23	32	3,146	\$361,423	\$59
August 2011	6,582	2,033	67	58	5,784	\$420,524	\$64
Sept. 2011	6,222	1,898	104	52	6,855	\$342,144	\$55
3 Month Total	18,915	5,623	194	142	15,785	\$1,124,091	\$59

Indigent Misrepresentation and Verification- Boston Municipal Court

Boston Municipal Court	# Indigent	# Found Not Indigent	# Misrepresent Indigency	# No Longer Qualified	# Indigent Verifications	Reduced Indigent Counsel Fee	Average Reduced Counsel Fee
July 2011	1,407	187	0	6	95	\$30,039	\$21
August 2011	1,276	198	0	3	565	\$28,005	\$22
Sept. 2011	1,318	140	2	2	833	\$28,446	\$22
3 Month Total	4,001	525	2	11	1,493	\$86,490	\$22

Four Court Findings on Indigency Misrepresentation

In a telephone interview with the HPAO Bureau, the First Deputy Commissioner said that in the latest survey of the four courts, in the four court study project that began in July, there was little evidence of indigent misrepresentation.

The four courts being studied by the Office of the Commissioner of Probation are Worcester District Court, Stoughton District Court, Middlesex Superior Court, and Berkshire Juvenile Court. The HPAO examination of issues surrounding indigency is limited to the District Court Department of the Administrative Office of the Trial Court. (AOTC).

The First Deputy Commissioner said that Worcester District Court in the first week of October conducted 154 indigency verifications out of 154 indigency status requests approved by judges of the Worcester District Court. Sixty-one (61) percent of the verifications undertaken in the first full week of October were completed within seven days, and 29 percent of the verifications took longer than seven days. The seven day benchmark was recently promulgated by language in the General Appropriations Act, or state budget, passed by the General Court and signed by the Governor in June 2011. Only two of those approved (154) at Worcester District Court were found to have misrepresented their indigent status. This is an indigency misrepresentation rate of just slightly over one percent. Out of the 154 cases verified, the First Deputy Commissioner told the HPAO Bureau, 48 were immediately found to have approved benefits with the Department of Transitional Assistance (DTA). This qualified them for indigent status, the First Deputy Commissioner of Probation said.

In the Stoughton District Court in the first full week of October, 17 individuals who appeared as offenders potentially facing penalties that include a “loss of liberty” if found guilty were approved for indigent status. None of those 17 were found to have misrepresented their financial wherewithal, and were found to be indigent and eligible for state paid defense counsel.

In the Middlesex Superior Court there were 22 requests for indigent defense counsel while in Berkshire Juvenile Court there were nineteen 19 requests for indigent defense counsel; only one individual was found to have misrepresented his financial status during the first full week of October, the First Deputy Commissioner told the HPAO Bureau in a telephone interview. All but one of the indigent verifications in either Middlesex Superior Court, or Berkshire Juvenile

Court were completed within the 7 day requirement. This HPAO Bureau examination was limited to the District and BMC courts.

Governor's House One Proposal: Indigent Defense Counsel Reform

Indigency verification was a part of the Administration's budget proposal to re-organize the Probation department, currently an agency organized in the Judiciary, and to re-organize the Committee for Public Counsel Services, currently an independent agency. The intent, the budget document stated, was efficiency and cost savings. A principal part of the reorganization was indigency verification which the Governor's budget specifically referenced.⁶³

Released in late January, 2011 The Governor's budget submission stated:

Indigency Verification:

The determination of eligibility is currently being performed by the Probation department, which the Governor is proposing to transfer to a new Executive Branch agency. This process will now be managed by the new Department of Public Counsel Services which will enhance and tighten the eligibility determination process. Only those that are eligible should be receiving services from the state, and there are significant concerns about the rigor of the current eligibility determination process. By increasing the controls of the eligibility determination and re-determination process, it is expected that the department's case load will decrease and the fee collections from people deemed "able to contribute" to the assignment of their counsel will increase.⁶⁴

In the Governor's budget proposal he suggested several changes which remained – although altered slightly by the legislative process – in the final budget enacted by the General Court and signed by the Governor. One of those changes was indigency definition and verification. For example, the Governor's budget proposal found "significant concerns about the rigor of the current (indigent defense counsel) eligibility determination process" and recommended that "a new independent executive branch agency called the Department of Public Counsel Services" be established which would assume the determination of eligibility from the Office of the Commissioner of Probation for those individuals who seek state paid defense counsel due to their financial status (impoverished and unable to pay). The General Court did not reorganize the Committee on Public Counsel Services (CPCS) into an executive department agency, but it did statutorily instruct CPCS to "establish a definition of "indigency" ...and uniform standards and procedures for the determination by the courts of the commonwealth..." The legislature further instructed in statute that "The definition [indigency] and standards, and any amendments thereto,

shall be subject to the approval of the Supreme Judicial Court...” Also, the General Court commanded the CPCS that in constructing the indigency definition, CPCS was to “utilize: (1) the reporting system operated by the commissioner of transitional assistance for the purpose of verifying financial eligibility of participants in state or federally funded programs; (2) the accessibility of income data available from the department of revenue; and (3) verifying material assets through the registry of motor vehicles.”⁶⁵

As demonstrated in preceding paragraphs it is difficult, if not impossible, with current available data, to determine if increased eligibility verifications will produce significant results. The Office of the Commissioner of Probation told the HPAO Bureau on several occasions that it didn’t expect to have any significant “yield” in indigent verification, but nonetheless agreed that the lack of a pilot demonstration, and a lack of data, made any determination of the scope of indigency misrepresentation view difficult to prove. Since the first meeting with HPAO Bureau, the Acting Commissioner of Probation implemented increased training, reporting, and oversight.⁶⁶

Also, the “significant concerns about the rigor of the current eligibility determination process...” remained, and the expectation persisted, that careful attention to eligibility would enhance the fee collection and decrease the case load. The Governor’s proposal stated:

Only those that are eligible should be receiving services from the state, and there are significant concerns about the rigor of the current eligibility determination process. By increasing the controls of the eligibility determination and re-determination process, it is expected that the department’s case load will decrease and the fee collections from people deemed "able to contribute" to the assignment of their counsel will increase.⁶⁷

In the Governor’s budget proposal, the possibility of uncovering large scale misrepresentation in the indigent defense counsel process was held out as a potential cost savings measure.

Two days before the Governor’s budget proposal was released, the state Secretary for Administration and Finance (ANF), was quoted in the State House News Service promising “tens of millions in cost savings” from greater accountability and program integrity which, the ANF secretary said, “will allow us to preserve indigent defense services and other critical programs....”⁶⁸

Prosecutors Indicate the Need for Indigent Verification

The Governor's budget proposal was, in the words of one prosecutor "an excellent conversation starter."

Several prosecutors indicated that there is a significant savings to be found in an examination in the indigent defense counsel program. Throughout the interview and document examination process the HPAO Bureau heard many claims regarding indigent misrepresentation and savings estimates as high as 15 percent of applications for indigent defense counsel. The HPAO Bureau was not able to verify a specific claim of misrepresentation although the 15 percent claim appears too high. The HPAO Bureau wrote to the Fiscal Affairs Division and requested information from the Department of Transitional Assistance and that action is addressed in another section of this report. The Office of the Commissioner of Probation is conducting its own pilot program on verification.

At a late January 2011 State House event one prosecutor stated:

Often you will see somebody say 'I can't get a lawyer.' They apply for indigent status, and invariably it comes back the person is in need of a free lawyer," the state prosecutor said. "And sometimes you will see the defendant gets in a better car than you or I could afford. That certainly is something that has to be tightened up."⁶⁹

The automobile anecdote is in the phase of the other District Attorney "an excellent conversation starter," however, it is not sufficient to determine indigency. Also, and as noted earlier, there was no in-force ISA with the state Registry of Motor Vehicles to utilize automotive assets as indicators of "earnings and assets." While the Probation Department told the HPAO Bureau that it has an "identity specialist tool" the letter to the HPAO Bureau from the RMV made no mention of this assessment instrument. The HPAO Bureau simply does not know if RMV records are useful in determining "earnings and assets."

The current definition of indigency is based upon a formula outlined in statute (MGL c 261 s 27A) and the process is promulgated by a rule of the Massachusetts Supreme Judicial Court (SJC Rule 3:10). The apparent guide for indigency when determining defense counsel eligibility is the second definition of MGL c 261, s. 27A", according to a memorandum on the website of the Massachusetts Supreme Judicial Court and addressed to the Commissioner of Probation.

That definition is "...a person whose income, after taxes, is 125 per cent or less of the current poverty threshold established annually by the Community Services Administration pursuant to section 625 of the Economic Opportunity Act, as amended..."⁷⁰, according the SJC memo regarding applying a definition to an "affidavit of indigency."

In that memo to the Commissioner of Probation, and available on the website of the Massachusetts Supreme Judicial Court, dated 26 January 2011, regarding “Poverty Guidelines for Affidavits of Indigency (M.G.L. c 261, s 27A: Applicable under S.J.C. Rule 3:10” the memo’s author noted that “as you know, the form (“Affidavit of Indigency”) follows the language of G.L. c 261, s 27A providing three different definitions of the word “indigent.” The second definition is “a person whose income, after taxes, is one hundred and twenty-five percent or less of the current poverty threshold annually established by the Community Services Administration*...” The asterisk directed the reader to this comment by the memo’s author that “Section 27A has not been updated to state that the poverty guidelines are now issued by the (Federal) Department of Health and Human Services.”

The memo attached the “New Federal Poverty Guidelines”, as they appear in the Federal Register of January 20, 2011, noted that these made exceptions of Alaska and Hawaii, and then instructed that “by multiplying each figure in the Federal Register table by 125%, one gets the following guidelines for G.L. c 261, s 27A”; the guidelines were attached in a chart.

The 26 January 2011 memo attachment indicated that a “size of family unit” of one person the “125% of Poverty Threshold” was \$13,612.50. While the “Size of Family Unit” in the attached chart listed its last category and the dollar amount for a family of eight, for the “125% of Poverty Threshold” as \$47,037.50.

The memo further stated: “Please inform probation officers, as soon as possible, of the existence of these standards which are to be used with the affidavit of indigency until new standards are published next year. Also, please note that pursuant to S.J.C. Rule 3:10, s 1 (f) (ii), as amended effective October 1 1993, this poverty standard applies to appointment of counsel for indigents.”⁷¹

The section of the General laws quoted in the 26 January SJC memo reads in full:

MGL c 261 s 27A

Section 27A. As used in sections twenty-seven A to twenty-seven G, inclusive, the following words shall have the following meanings:

“Indigent”, (a) a person who receives public assistance under aid to families with dependent children, program of emergency aid for elderly and disabled residents or veterans’ benefits programs or who receives assistance under Title XVI of the Social Security Act or the Medicaid program, 42 U.S.C.A. 1396, et seq.; (b) a person whose income, after taxes, is 125 per cent or less of the current

poverty threshold established annually by the Community Services Administration pursuant to section 625 of the Economic Opportunity Act, as amended; or (c) a person who is unable to pay the fees and costs of the proceeding in which he is involved or is unable to do so without depriving himself or his dependents of the necessities of life, including food, shelter and clothing, but an inmate shall not be adjudged indigent pursuant to section 27C unless the inmate has complied with the procedures set forth in section 29 and the court finds that the inmate is incapable of making payments under the plans set forth in said section 29.

New Indigency Definition Sought

The most recent General Appropriations Act shifts the responsibility for the indigency definition to the Committee on Public Counsel Services (CPCS). Motor vehicle records are included in the statute governing verification and that statute requires an interagency service agreement with the Department of Motor Vehicles.⁷²

Currently, the First Deputy Commissioner of Probation told the HPAO Bureau, the Probation office is negotiating Memorandums of Understanding (MOU) and interagency service agreements (ISA) with the Department of Revenue (DOR), the Registry of Motor Vehicles (RMV) and the Department of Transitional Assistance (DTA). Only the DOR has a current, in force interagency service agreement with the Office of the Commissioner of Probation; the First Deputy Commissioner told the HPAO Bureau. Once the under-negotiation ISA's are signed, the in force ISA at DOR will be replaced with a new MOU and/or ISA. The other ISAs will be put in place, probation officers will be trained regarding the new ISAs, MOUs and other pertinent procedures, and indigent verification will be conducted on a uniform basis throughout the court system the First Deputy said.⁷³

Claims of Misrepresented Indigency As Much As 15 Percent of Applicants

During the HPAO Bureau's examination a claim of a 15 percent savings from indigency verification, as noted in the news account of an early 2011 winter Ways and Means hearing, continued to be referenced. During several interviews, the HPAO Bureau asked and was told that that statistic of misrepresented indigency was based upon an estimate developed by the Administration and attributed to the current misrepresentation and denial rate for Transitional Assistance applications at the state Department of Transitional Assistance (DTA). The DTA denial rate was 30 percent and the Administration took half that number and arrived at an indigency verification misrepresentation rate of 15 percent, the HPAO Bureau was told.

After hearing several iterations of this statistical estimate of misrepresentation, the HPAO Bureau made an inquiry of both the Department of Transitional Assistance and the Fiscal Affairs Division of the Executive Office for Administration and Finance.

The HPAO Bureau requested the Department of Transitional Assistance (DTA) to provide a representative approval/denial rate for its public assistance applications.

The DTA provided the HPAO Bureau with a June 2011 spread sheet which demonstrated that out of 5,334 total transitional assistance applications for Transitional Aid to Families with Dependent Children (TAFDC), 1,716 individuals were denied transitional assistance benefits. That number, 1,716 individuals denied benefits, comprised 32 percent of total TAFDC applications. Out of those 1,716 individuals denied TAFDC or DTA benefits, 436 were determined ineligible for Transitional Assistance benefits due to earning or assets reasons. That number of individuals represented 25.5 percent of the applicants that were denied transitional assistance benefits (not total applicants). The bulk of transitional assistance applicant denials, however, (74.5 percent) were disqualified for “other” reasons than earnings or assets disqualifications. So attention to the “yield” of earnings or assets denials, which is the denial reason that indigent defense counsel qualifications are based on, is important.

That number of actual denials for transitional assistance benefits due to “earnings and assets” is 436 individuals, or only 8.17 percent, of the total applicants for transitional assistance (5,334 applicants in June 2011); it is important to note that the applicants applying and denied for reasons of “earnings or assets” is not 30 percent of the total applicants, or even 15 percent of the total applicants. Therefore, the DTA estimate of the “yield” of misrepresentation, is not 15 percent but just over eight percent when based upon an “earnings and assets” criterion.

In addition, there is no similarity demonstrated between DTA applicants and indigent defense counsel applicants; so, if the claim of misrepresentation is based upon DTA criterion even the eight percent estimate of misrepresentation is questionable. Whether the two client populations are similar is unknown.

HPAO Bureau requested a full year of transitional assistance; no response was received from DTA.⁷⁴

Fiscal Affairs Division Queried; Estimates Questioned

In addition to its inquiry of DTA, the HPAO Bureau also made an inquiry of the Fiscal Affairs Division (FAD) of the Executive Office of Administration and Finance. The FAD is the agency responsible for the development of the Governor’s budget proposal.

The HPAO Bureau indicated to the FAD that it “had been told, and have seen some written references, that there is a claimed 15 percent cost savings available by implementing a rigorous program of indigent verification” for those seeking state paid defense counsel if an offender is found guilty and a jail sentence is possible. The HPAO Bureau also noted that it had searched the FAD and A&F websites and found no direct cost savings reference, yet the HPAO Bureau

continued to encounter references to this 15 percent cost savings attributed to rigorous indigent verification.

The FAD responded affirmatively that it had in fact assumed a 15 percent rate of denial for state paid indigent defense counsel and it was based upon DTA experience with “a more rigorous process and system (of verification) in place that supports eligibility reviews.”

In a letter, the FAD told the HPAO Bureau that “ANF (the Executive Office of Administration and Finance) reviewed a number of areas of current practice at CPCS. This included the indigency verification process employed by the Probation Department on behalf of CPCS...”

“ANF found,” the FAD letter stated, “that the existing process consisted of a 2-page pretrial intake/indigency report which did not appear to include any further systemic verification of income and asset levels and did not encompass a regular re-verification...consistent with many other state programs.”

“ANF compared the existing process by the Probation Department with that at the Department of Transitional Assistance (DTA).” FAD’s letter to the HPAO Bureau stated that discussions with DTA regarding that agency’s “rigorous process” of eligibility determinations demonstrated to “ANF” that “a more rigorous process and system in place that supports eligibility reviews, including wage matches with Department of Revenue and other databases, DTA ultimately determines that as many as 30 percent of the applicants for its programs are, in fact, not eligible.”

The FAD letter closed its explanation by asserting its belief that its assumptions were “fair and reasonable” and explained that “in order to plan for savings conservatively, ANF assumed that, through an inter-agency agreement that would shift indigency verification activities to an agency such as DTA, approximately 15 percent of CPCS applicants that would otherwise be determined to be eligible...would be found ineligible...ANF projected that up to \$25 million in savings could be achieved on an annualized basis.”⁷⁵

The FAD confirmed the source of the claim of 15 percent misrepresentation among indigent applicants. Yet, based on the HPAO Bureau examination, the DTA rate does not achieve 15 percent based on “earnings and assets”, nor is there a connection established between DTA applicants and indigent defense counsel applicants.

The representative sample of eligibility and denials for TAFDC and EAEDC provided to the HPAO Bureau by DTA - as noted above - appear at odds with the FAD claim.

The DTA had a 30 plus percent denial rate on all its applications in the sample (June 2011); but DTA’s ineligibility finding was based on a multitude of disqualifications most of which did not involve verification of a lack of “earnings and assets” which is the only current eligibility criterion that applicants for indigent defense counsel must meet. As noted above the DTA denials for eligibility based on “earnings and assets” was only 8.17% of total applicants for TAFDC (Transitional Aid to Families with Dependent Children) and even fewer DTA applicants were determined ineligible based on “earnings and assets” when the EAEDC program

(Emergency Aid to Elders, Disabled and Children) was examined. The EADC denial rate based on “earnings and assets” was 102 denials, or 3.02%, out of a total of 3,380 cases reviewed.⁷⁶

The FAD cost savings estimate of “up to \$25 million in savings” based on the “conservative” estimate outlined in the letter to the HPAO Bureau is questionable. The data and statistics simply do not support that conclusion.

Further, there is no indication, and FAD does not mention in its letter, whether the DTA benefit applicants and those applying for indigent defense counsel are comparable populations. The HPAO Bureau finds no data, or statistics, or even anecdotes which lend any validity to assuming that DTA’s experience will replicate itself in the indigency verification process.

Pilot Projects to Determine Realistic Expectations Recommended

In one of its first acts, the HPAO Bureau interviewed both the Chairman of The Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts and the chief counsel to the Commission. The Commission held eight public hearings over six months and took testimony from “more than forty witnesses” including the Attorney General, the Chief Justice for Administration and Management of the AOTC, the chief justices of the Superior District, Boston Municipal Court and Juvenile Court Departments of the AOTC, six of the eleven District Attorneys, and the chief counsel for CPCS. The Commission and its staff also reviewed “a substantial amount of written materials from all quarters of the judicial system.” Both the Commission Chairman and the Commission chief counsel independently told the HPAO Bureau that the Commission recommended one or more pilot projects to monitor, examine and analyze the concept of cost savings for indigent defense counsel against what actually was workable. The Commission finished its work in April 2005 after six months of inquiry. The pilot projects were discussed but never implemented, the HPAO Bureau was told.

In October, the Office of the Commissioner of Probation told the Bureau that a four court pilot project had begun to examine indigency verification. The Probation Department also has been training its officers on the indigency verification protocols, and monitoring the results. As noted above, the Probation Commissioner and the First Deputy Commissioner and staff are becoming more comfortable with the results of that monitoring and more confident that the results that project is obtaining are valid.

The HPAO Bureau finds further indication that the current data, statistics, and other sources of information are unreliable, most probably un-auditable. This makes projections, cost savings estimates, misrepresentation estimates, and other data dependent promulgations unreliable.

A valid, controlled, and representative pilot project(s) whose results instill confidence is a necessary first step to achieving management produced cost savings. It will take time to produce valid information.

Section 4

Revenue Reconciliation Reports of AOTC

- Concern regarding the indigent defense revenue reconciliation reports of indigent defense counsel fees;
- Disproportionate pattern in collection of indigent defense counsel fees in district and Boston Municipal courts;
- AOTC needs to audit and analyze the revenue reconciliation for indigent defense counsel fees;
- MassCourts when fully implemented should have the ability to record accounts receivable and to implement a system-wide accounts receivable function to track revenue receipts in each court of the department;

Revenue Reconciliation Reports of AOTC indicate that (Appendix A):

- For three years (FY 2009 through FY 2011) District Court **A13 with a three year averaged number of 601 criminal cases** recorded indigent defense fee (“\$150 fee”) for a total revenue of \$20,580.00;
- While court **A19 with a three year averaged number of 7,004 criminal cases** recorded indigent defense fee (“\$150 fee”) for a total revenue of only \$8,070.00 during the same period of time;
- Court **A11 with a three year averaged number of 9,434 criminal cases** reported the collection of **no** indigent defense fee (“\$150 fee”) revenue;
- And one court, **A3, with a three year averaged number of 12,360 criminal cases** reported total **negative** revenue (\$-1,750) for FY2009 through FY2011.

Identifying the money and the source of the money to operate an effective indigent defense counsel program and using that money efficiently is a necessary component of the judicial system’s constitutional duty to the indigent, as noted in both the Rogers Report and in the Governors January 2011 budget proposal.

In the course of its examination the Bureau was given several AOTC documents termed: Trial Court Revenue Reconciliation Management Report. These documents are Excel spreadsheets that report on monies collected and applied as revenue from all the courts of the AOTC. These Revenue Reconciliation Reports contained three categories of interest to the HPAO Bureau: a category that reported on the collection of indigent defense revenues termed “Indigent Defense”; a category that reported on “Legal Counsel Fees”; and a category termed: “Total Reimburse

Indigent Counsel.” These categories represent either the revenue obtained from approved applicants for indigent defense who were either declared indigent and unable to pay for an attorney (“Indigent Defense”) or the category labeled “Legal Counsel Fees” that represent revenues collected from those who were found to be on the margin of indigence and for whom was negotiated a payment of an agreed percentage of their assigned public counsel costs; the third category represented the total of those two revenues as collected from each court in the Superior, District, BMC, and Juvenile courts of the AOTC, as a partial payment toward the state paid defense counsel costs. The total collected revenue over three fiscal years (FY 2009 through 2011) is approximately \$8 million in each year, for a total of \$24 million; that annual collected revenue is deposited to the Commonwealth’s General Fund.

As noted earlier, the HPAO Bureau was asked only to review the indigent defense counsel issues in the District and Boston Municipal departments of the trial court.

For clarification these categories are referred to in this report both by their label “Indigent Defense”; which is the category that represents the revenue derived from the Indigent Defense counsel fee/revenue category noted in the preceding paragraph or just “\$150 fee,” and the “Indigent Legal Counsel Fee” and/or \$150+ revenue; this reference regards those persons who are just marginally above indigent but still unable to bear the cost of a defense attorney. These \$150+ persons are assessed a fee greater than \$150 at the discretion and determination of the particular court. The category of “Total Reimburse Indigent Counsel” represents a sum of the \$150 fee, and the \$150+ revenue.

After examining the Trial Court Revenue Reconciliation Management Report documents for Fiscal Years, 2009, 2010, 2011, and 2012 (one month of results at the time of the HPAO Bureau’s request) the HPAO Bureau found disparities in the figures.⁷⁷

Using the Trial Court Revenue Reconciliation Management reports, the Bureau began a review of the 62 District Courts’ and the eight Boston Municipal Courts indigent revenue. Upon examination, the court case loads appeared to have little or no bearing on indigent revenue collections, courts with large caseloads and lower income demographics were collecting less money for indigent revenue than mid-sized caseload courts with higher income demographics. Several courts with lower income demographics reported negative revenue for their indigent defense revenue collections (the “\$150 fee”); some courts with lower income demographics reported no revenue collected from the “\$150 fee”; some courts reported high collections in the “\$150 fee” and low collections in the “\$150+ revenue” (the marginally indigent who are assessed more than \$150 fee) in FY 2009 and FY 2010, and sometimes those specific revenue reports reversed themselves and the court reviewed collects low indigent fee “\$150 fee” and very high “\$150+ revenue” for the marginally indigent.

The Bureau’s policy is not to identify its subjects in public reports by name, only by description. The purpose of this is to address the findings (and recommendations) that the HPAO Bureau makes to the HPAO Committee and identify the areas of concern for the members.

For the purpose of discussion the courts used for these examples are identified by their position on the HPAO Bureau-created spreadsheet, using the AOTC supplied figures, attached as an

Appendix. The courts are labeled using the letter of the first column (letter A) and the number is the vertical number location of the court on the spreadsheet. The size of the court listed also for comparative example is an average of its criminal cases over three most recent available years as reported on the AOTC website. A copy of that spreadsheet is attached as **Appendix A**.

Negative Indigent Revenue

For an example of negative revenue in the “\$150 fee”, in FY 2009 the **A3** court with a three year average of criminal defendants of 12,360 each year reported a **negative revenue** of \$-300 for its indigent defense (“\$150 revenue”); the next fiscal year that “\$150 fee”, was reported as \$0; and for FY 2011 that same **A3** court again reported a **negative revenue** collection of -\$1,450 for its “\$150 revenue”.

In those same fiscal years but in the category of “\$150+ revenue” (marginally indigent) the **A3 court reported** a revenue collection of \$185,203.50 for its “\$150+ revenue” (marginally indigent) in FY 2009; the following year (FY 2010) the **A3** court reported revenue in the “\$150+ revenue” as \$188,684.00, and in FY 2011, the **A3** court reported revenue of \$165,074.00 for its “\$150+ revenue” or indigent legal counsel fee.

An excerpt of the HPAO Bureau chart displays this negative (and larger \$150+) revenue below. The income per capita was not available in the DOR statistics for this particular court.⁷⁸

A3 Court – Large Criminal Case Court

3 year Average Criminal Defendants (TRC Statistics)	1999 Income Per Capita (DOR)	FY2009 Indigent Defense (150) FY2009	FY2009 Indigent Legal Counsel Fee FY2009	FY2010 Indigent Defense (150) FY2010	FY2010 Indigent Legal Counsel Fee FY2010	FY2011 Indigent Defense (150) FY2011	FY2011 Indigent Legal Counsel Fee FY2011
12,360	N/A	(\$-300)	\$185,208.50	\$0.00	\$188,684.00	(\$-1,450)	\$165,074.00

A similar instance of negative revenue was also found in a mid-sized court **A19** handling an average annual case load over the last three years of 7,004 criminal cases. That **A19** court reported negative revenue collected for its “\$150 fee” revenue in FY 2009. Collections in this category of “\$150 fee” revenue for FY 2010 were \$3,945.00, and in FY 2011 that collection recorded \$4,125.00 in “\$150 fee” revenue.

An excerpt chart is listed below for **A19**, a mid-sized District Court.

3 year Average Criminal Defendants (TRC Statistics)	1999 Income Per Capita (DOR)	FY2009 Indigent Defense (150) FY2009	FY2009 Indigent Legal Counsel Fee FY2009	FY2010 Indigent Defense (150) FY2010	FY2010 Indigent Legal Counsel Fee FY2010	FY2011 Indigent Defense (150) FY2011	FY2011 Indigent Legal Counsel Fee FY2011
7,004	\$17,492	(\$-150)	\$306,791.44	\$3,945.00	\$294,518.00	\$4,125.00	\$341,831.00

Same Size Criminal Cases as A19; Higher Revenue

Two other District Courts, **A25** and **A9**, each have about 8,500 criminal cases annually (three year average), or just 20 percent more than District Court **A19** (7,004 criminal cases annual average). Yet, those two courts, **A25** and **A9**, report significantly more revenue from indigent defense counsel fee collection (“\$150 fee”). Their income per capita statistics as reported by the state Department of Revenue are similar. **A19** income per capita is \$17,492.00; **A25** per capita income is listed at \$17,163, while **A9** is listed at \$17,557, according to the Massachusetts Department of Revenue. The DOR most recent income per capita data is from 1999.⁷⁹

District Court **A25** collected \$16,807 in FY 2009 in “\$150 fee” revenue, compared to District Court **A19**’s “\$150 fee” collected revenue of -\$150 (negative revenue collection). The following year **A25** collected \$19,470.80 in “\$150 fee” revenue (indigent defense fee), while **A19** reported only \$3,945.00 in the “\$150 fee” category. In FY 2011, **A25** collected \$19,882.00 while **A19** collected only \$4,125.00 in “\$150 fee” revenue.

In another District Court (**A11**) where the three year average criminal case load was about 9,500 (or about 1,000 more than District Court **A25**, and **A9**, and 25 percent more criminal cases than District Court **A19**), there was zero revenue reported from the indigent defense category “\$150 fee” revenue. Also odd, the per capita income reported by DOR for the area served by District Court **A11** was \$15,602; significantly less than DOR’s per capita income statistic for District Court **A25** (\$17,163), and District Court **A9** (\$17,557), and District Court **A19** (\$17,492). So there was a lower per capita income in the area of District Court **A11** but no “\$150 fee” reported for the fiscal years FY 2009, FY 2010, and FY 2011. However, in the other category, the “\$150+ fee” for marginally indigent defendants category, District Court **A11** reported collecting \$258,463.00 (FY2009), \$244,512.00 in FY 2010, and \$286,922.62 in FY 2011.

The HPAO Bureau spreadsheet excerpt for **District Court A11** is listed here.

3 Year Average Criminal Defendants (TRC Statistics)	1999 Income Per Capita (DOR)	FY2009 Indigent Defense (150) FY2009	FY2009 Indigent Legal Counsel Fee FY2009	FY2010 Indigent Defense (150) FY2010	FY2010 Indigent Legal Counsel Fee FY2010	FY2011 Indigent Defense (150) FY2011	FY2011 Indigent Legal Counsel Fee FY2011
9,434	\$15,602	\$0.00	\$258,463.00	\$0.00	\$244,512.00	\$0.00	\$286,922.62

- **Even the smallest criminal caseload district court (A13 with 601) reported more indigent fee revenue than courts much larger;**
- **A13 (601 average criminal cases) reported more “\$150 fee” revenue than:**
- **A19 (11 times more criminal cases),**
- **A11 (15 times more criminal cases), or,**
- **A3 (20 times more criminal cases).**

In its review of “\$150 fee” revenue collection of the district courts, the HPAO Bureau found that the district court with the smallest criminal case load as reported by the AOTC, (District Court **A13** with 601 three year averaged criminal cases) reported \$5,865.00 in FY 2009 in “\$150 fee” revenue, \$9,140.00 in FY 2010 in “\$150 fee revenue”, and \$5,575.00 in FY 2011 in “\$150 fee” revenue. That is more “\$150 fee” revenue than reported in **A19** with 7,004 three year averaged criminal cases in any year, it is more “\$150 fee” revenue than district court **A11** with 9,434 three year averaged criminal cases in any year; and more “\$150 fee” revenue than court **A3** with a three year average of 12,360 criminal cases reported by the AOTC in any year.

- For those three years (FY 2009 through FY 2011) District Court **A13 with a three year averaged number of 601 criminal cases** reported a total “\$150 fee” revenue of \$20,580.00;
- While court **A19 with a three year averaged number of 7,004 criminal cases** reported only \$8,070.00 of “\$150 fee” revenue for the same period of time;
- Court **A11 with a three year averaged number of 9,434 criminal cases** reported **no** “\$150 fee” revenue;
- And one court, **A3, with a three year averaged number of 12,360 criminal cases** reported **negative** revenue (-\$1,750) for FY2009 through FY2011.

AOTC Revenue Reconciliation Disparity

In an interview with the HPAO Bureau the AOTC produced a memorandum dated 22 August 1990 (Attached as Appendix D, item 2) which indicates that the indigent counsel fees should “collect and record this item separately.” The memo also noted that “It is necessary to segregate the receipting process for this item and to have the ability to identify the category account for future inquiries.”

In a discussion with the HPAO Bureau the AOTC stated:

It appears that the negative balance amounts and the zero balance amounts on our monthly report are due to the court not properly recording the difference between indigent counsel fee and marginally indigent counsel fee. Although a memo was issued in 1990 (attached) instructing courts to maintain these categories separately, it seems that over time, through multiple employee changes at each court and the fact that the legislation did not require the separate tracking of these two categories, diligence in insuring the categories were kept separate waned.

The AOTC agreed that a diligent audit and oversight of the indigent defense counsel fees was necessary and appropriate and the AOTC indicated that the complete installation of MassCourts, the automated court management system, would have the capacity to accurately record and tabulate the indigent defense counsel fees both system-wide and court by court. The MassCourts installation would also correct the account receivable function throughout the system, the AOTC told the HPAO Bureau.

The AOTC also believes that although the individual categories contain mis-recorded revenue, the total revenue deposited with the state Treasury and sent to the general fund is correct.

Section 5

Indigent Defense Legal Services - Public Defender Functions

Connecticut – Maine – New Hampshire – Rhode Island - Vermont

Throughout the New England States, the rising costs of indigent defense and public defender functions coupled with significant and repetitive budget reductions are part of what public officials across the country are calling a funding crisis for the nation's judicial systems.

Connecticut – July 21, 2011 (The Boston Globe) – Public Defenders feel squeeze from budget cuts

- The state's public defenders say proposed budget cuts will push lawyer caseloads too high and make it difficult for them to meet their constitutional and ethical obligations to Connecticut's poorest citizens.
- After state employee unions rejected a \$1.6 billion labor savings deal last month, the legislature told the public defenders' office that it needed to cut its two-year, \$128 million budget by about \$9.6 million, or 7.5 percent.
- The Office of Chief Public Defender, which handles more than 90,000 cases a year, has about 400 full-time workers, half of whom are lawyers.
- Public defenders' caseloads are already at or above state guidelines set in 1999 in response to a lawsuit that said the public defender system was so overwhelmed that it could no longer fulfill clients' constitutional rights to an adequate legal defense
- The public defenders' office has already cut 42 temporary and independent contractor jobs and is planning to eliminate 33 permanent jobs.
- The office cut all 30 of its per diem independent contractor positions, including 16 lawyers, and laid off 12 temporary employees, including seven lawyers. .
- To meet the savings mandated by the Legislature, the public defenders' office is proposing laying off 24 full-time employees and eliminating another nine jobs through attrition or retirements.
- Judicial officials have compiled budget cut plans that they worry would trample on people's constitutional rights.

- The Judicial Branch is proposing to lay off about 450 employees and closing four courthouses and a juvenile detention center. The Criminal Justice Division, which oversees prosecutors, is planning to cut 88 jobs.

Maine – January 28, 2011 (The Bangor Daily News) - Indigent legal services running out of money

- The state commission charged with paying for attorneys to defend poor people charged with crimes and facing jail time could run out of money in May.
- The executive director of the Maine Commission on Indigent Legal Services, told members of the Appropriations Committee that it not only can't cut \$98,000 from its budget, but the commission needs back two-thirds of the money cut from its budget last year in order to pay its bills through June 30, the end of the fiscal year.
- When the supplemental budget was passed last year, \$600,000 was cut from the budget. Based on second-quarter data, the best estimate of anticipated costs through the end of Fiscal Year 2011 is the need for an additional \$400,000.
- The Executive Director appeared before the Appropriations Committee in response to a request from the Governor that \$98,000 be found in savings for the rest of the year.
- The commission was established by the Legislature in 2009. Last July, the commission took over payments from the court system to attorneys who represent indigent defendants facing jail time.
- Maine was the last state to form some type of independent agency to oversee legal defense for the indigent. That role had been handled since the 1960s by the state's judicial branch, in a system that was plagued by inefficiencies and conflicts of interest.
- While the reason for creating the commission included providing independent oversight of the delivery of indigent counsel services and improving the quality of representation, a driving force was money.
- The report that recommended creating the commission concluded it was impossible for the court system to predict how much money would be needed each year to pay attorneys, creating a drain on the judiciary.
- In response, the Chairman of the Appropriations Committee said. "For Maine, this is still in many ways an experiment. There's no question about the requirement to provide representation, but I'm hoping the commission will be open to a review of their processes and be open to looking at ways to manage fiscal impact of indigent legal defense on the general fund."

New Hampshire – July 1, 2009 (The Keene Sentinel) – Grass is a bit greener for Public Defenders

- Horror stories involving overworked and under-funded public defender offices across the nation have become commonplace. The issue has reached a boiling point in at least seven states where public defender offices have refused to take on new cases for fear of being unable to provide a capable defense.
- In New Hampshire, the Office of the Public Defender is experiencing the same budget-related hardships as most other state-funded agencies, but remains relatively healthy, according to its executive director. “These are pretty tough times, but we’re providing an adequate defense” for indigent defendants, he said. “I don’t think there’s a threat to the necessity of representation for these defendants.”
- Fewer than 120 public defenders working out of offices in each of the 10 counties across the state handle an estimated 28,000 cases each year. The average New Hampshire public defender is handling 65 to 75 open cases at any given time, but could sometimes have more than 90 cases.
- Caseloads are increasing annually, but the number of new public defenders being hired is not keeping pace. “We just had a 5 percent layoff statewide at the public defender office,” the executive director said. “We lost between 15 and 20 people across the board, attorneys, staff investigators, everything.”
- This year the office has a \$17 million budget for indigent defense, according to the executive director. “The Legislature was very responsible in preserving the essence of the program,” he said. “The funding levels are going to enable us to provide the same level of service and we won’t have to endure any additional layoffs.”
- One former New Hampshire public defender laid off in March as part of budget cuts said he’d worked as a public defender for two years. “The director came to every office and said there was a possibility of layoffs and then one day the ax just fell,” he said. “When I left it was all on good terms. I truly enjoyed my time there.”
- The public defender office’s training program, which encourages its lawyers to further their legal knowledge, hone trial skills and stay up to date on developments in forensics and treatment options for offenders, was also negatively affected by the state’s budget cuts.
- While he foresees more troubled times ahead for the state’s public defender office, the Executive Director said the breaking point is a long way off. “I think we’re going to get by with what we have,” he said. “Never say never, but right now things look okay.”

Rhode Island – October 18, 2010 (The RI Lawyers Weekly) – Overworked and underfunded public defenders

- Lawyers in the Rhode Island Public Defender’s Office are among the most overworked in the nation, and the situation is not likely to improve anytime soon.
- Confirming what those in the office already know firsthand, a study recently released by the Bureau of Justice Statistics found that Rhode Island’s public defender program falls outside the mainstream in many key areas including staffing, spending and caseload when compared to the other 21 state-run programs in the nation.
- Based on data from 2007, the state’s program ranked lowest in the number of full-time attorneys on staff and near the bottom in the percentage of “judiciary and legal funds” spent on public defense.
- The head of the office said he now has 48 attorneys, about two-thirds of the number he estimates is needed to properly manage the growing number of cases the office sees each year. That he has frequently turned to the governor and the Legislature to explain the dire circumstances the office is in and to get more added to the office’s current \$9.5 million budget, but to no avail. They understand it, but they just don’t have the money.
- He said that he would like to see caseloads cut in half to levels comparable to what Massachusetts and Connecticut public defenders manage, but that requires hiring another 24 lawyers, something unlikely to happen in the near future given the state’s budget difficulties.
- The state’s spending for public defense was among the lowest of all the state programs studied. Rhode Island spent about 8.7 percent of the total budget allocated for judicial and legal expenses, a figure comparable to the percentage Connecticut (8.4 percent) spent, but only about half of what Massachusetts spent (15 percent).
- Rhode Island was one of only three states that did not require indigent criminal defendants to pay for some of their legal costs. Nineteen other states allowed various administrative and court fees to be collected, ranging from \$10 to \$200 depending on the state and the type of case.
- The head of the office said he has talked to officials in Connecticut, a state that does try to recoup some legal costs from indigent defendants, but he has not pursued a similar strategy in Rhode Island because he was warned of constant collection challenges and the likelihood of creating an adversarial relationship with the clients. Besides, he said, any money that is recouped has to go into the state’s general fund where revenue from parking tickets and other fines accumulate and cannot be specifically earmarked for office services.

- He said in order to maintain level service in fiscal 2012, he has asked for \$10.3 million. However, the Governor's Office has warned that he should prepare a budget that includes a 15 percent cut. A proposition that would force the layoff of 25 employees.

**Vermont – January, 2011 (Office of the Defender General) – Fiscal Year 2012
Appropriation Key Budget Issues**

The HPAO Bureau desired to cite a Vermont originated newspaper article for inclusion in this report, however, the Times Argus News Corp. (The Montpelier Argus & The Barre Times) offers only a subscription based archival service.

- The Governor's recommended funding for FY 2012 continues current services, and provides funding for a litigation support in response to the increased number and seriousness of crimes.
- The salaries of top level staff attorneys were reduced by five percent in FY 2009, and remain frozen in FY 2012. Most other operating line items are level funded.
- With this level of funding, the Office of the Defender General expects to continue to fund the various improvements made to the delivery of cost-effective public defense services over the last few years. If the ODG must absorb budget reductions in the future, one or more of these improvements might have to be eliminated.
- The ODG will continue the cost containment measures implemented in FY 2002.
- One of the prime measures of the demand for defense services is the number of added clients during a fiscal year. Public defenders in Vermont routinely represent significantly more clients than is recommended under guidelines developed in 1973 to assure competent representation by the National Advisory Commission on Criminal Justice Standards and Goals.
- Persistent fiscal and caseload pressures continually threaten to undermine the integrity of the criminal justice system. If this office fails to deliver on the promise of effective representation, the validity of each and every conviction obtained is subject to credible attack by those individuals deprived of their constitutional right.
- The office has had significant problem with lawyers leaving the public defense system and qualified applicants withdrawing their applications. With the fiscal uncertainty of almost quarterly budget cuts, the prospective attorney workforce has become wary of entering into state government and the office has experienced new and even high-level attorneys leaving the public defense system for opportunities in the private sector.
- Simply put, it is becoming extraordinarily difficult to hire new public defenders and to retain experienced public defenders.

Indigent Defense Legal Services - Public Defender Functions

Georgia - Iowa - Michigan - North Carolina - Oklahoma - Texas

In response to the rising costs of indigent defense and public defender functions and faced with significant and repetitive budget reductions, many states across the nation are taking varied actions in order to address the issues at hand.

Georgia – June, 2011 (Dept. of Audits & Accounts) – Public Defender Services: Indigent Determination & Costs

- In FY 2010, the state spent approximately \$40 million providing legal services to indigent defendants, while counties spent an estimated \$70 million.
- The review examined the processes for ensuring these resources are directed to those defendants who are truly indigent and the processes for recovering certain costs when required or allowed.
- Specifically, the audit determined the effectiveness of: practices used to screen criminal defendants for indigent defense; efforts to ensure the accuracy of defendant's self-reported information; and, efforts to recover costs associated with defending indigent defendants.
- The audit found that decisions to provide public defender services were not always adequately supported by documentation in the defendant's files and that efforts to recover a portion of defense costs were inconsistent across judicial circuits.
- The review and comparison of eligibility standards to 711 defendant applications from nine circuits found that 35 percent of the applications lacked adequate documentation to make a proper determination (e.g., missing applications, applications lacking key information or with questionable income). An additional 5 percent of the applications appeared to be noncompliant due to the defendant's income exceeding income requirements. The audit found that these issues were the result of deficiencies in the screening and verification processes.
- The review also identified weaknesses regarding the circuits' cost recovery practices. Although state law requires any person applying for legal defense services to pay a \$50 application fee, the review found that almost no defendant's pay the fee upfront when applying for a public defender. And in the majority of cases reviewed, courts were either unable (by law) or unwilling to order the defendant to pay the fee at the end of the case.

- The Georgia Public Defender Standards Council, circuit personnel responsible for indigent determination and the courts must each take steps to address these issues.

Iowa – September 13, 2011 (Radio Iowa.com) - Iowa's Court System hires collection service for unpaid fines

- Iowa court officials at the state and county levels are stepping up their efforts to collect unpaid fines and fees.
- Last year, the Legislature approved new collection procedures and reinforced several existing procedures in order to improve collection of unpaid fines and court fees and to help offset shrinking state revenues.
- Iowans currently owe more than \$558 million in civil and criminal court fees. Of that total, 71 percent of the past-due debt involved criminal cases – many where the debtors either were indigent or incarcerated.
- Now, a law firm that provides collection services has been hired to pursue debts that are at least one year past due. The private, third-party collection agency that was contracted for after a competitive bid process is authorized by state law to add 25 percent to the amount owed for their fees.
- The collection agency program was tested in one county last month and is now expanded into 30 more counties.
- A Judicial Branch spokesperson said that the state has also reinforced an existing collection procedure that involves county treasurers. State law requires a county treasurer to refuse to renew a vehicle registration when the vehicle owner owes unpaid fines and court fees. Once an owner pays the debt, the county treasurer will allow renewal of the registration.
- In addition to the new third-party collection agency and the expanded role of county treasurers, the spokesperson said the judicial branch is continually working to strengthen collection efforts. For example, clerks of court around the state are working to unearth old debt and add the information to the judicial branch data base. Once in the data base, the debt will trigger a number of fine collection procedures.
- The spokesman expects the new efforts to recoup money will boost state, county and city revenues. Last year, the Judicial Branch collected \$163 million dollars in court fines and fees. Most of that, about \$146 million, goes to the state's general fund and another \$17 million went to city and county governments.

Michigan – October 14, 2011 (The Chicago Tribune) – Gov. Snyder names commission to improve legal defense

- Governor Rick Snyder issued an executive order setting up a commission to study ways to improve legal representation for low-income residents charged with a crime.
- The Governor wants the Indigent Defense Advisory Commission's 14 members to recommend a set of improvements by next July 15 that will lead to cost-effective, qualified legal counsel provided in a consistent manner around the state.
- The Michigan Campaign for Justice has been pushing for three years to improve Michigan's public defense system and welcomed Snyder's move. "This commission presents a true opportunity for needed reform," said the Executive Director.
- Michigan was a 19th century pioneer in indigent legal aid but now has one of the nation's stingiest and most fragmented public defense systems.
- A 2008 report found that \$74.4 million was spent annually in Michigan on indigent defense, or \$7.35 per person. That's 38 percent less than the national average and less than all but six states, the National Legal Aid & Defender Association said in "A Race to the Bottom," commissioned by Michigan lawmakers.
- Courts in each of Michigan's 83 counties set their own pay rates and hiring systems for public defenders. The state provides overall funding but the courts determine how much to spend, which lawyers to hire and how much help to give them with expert witnesses and investigations.
- The report found some courts pay lawyers on a contract basis as little as \$40 an hour, or pay flat fees for them to take on as many indigent cases as come before the court in a given period. It found that many county systems are filled with conflicts of interest that make defense lawyers beholden to judges who want to keep cases moving.
- Wayne County Circuit Court Judge W. McCree, a Campaign for Justice board member, said, "It is time Michigan undertakes desperately needed and long overdue reforms to improve our broken public defense system."

North Carolina – March 1, 2011 (Commission on Indigent Defense Services) – Report to the General Assembly

- The North Carolina Commission on Indigent Defense Services has accomplished a great deal since its formation and is preparing to accomplish even more in the years to come. To improve the efficiency, cost-effectiveness, and quality of the State's indigent defense program in the long run, the Commission and IDS Office have implemented a number of initiatives and measures to slow the rate of increase in spending without compromising the quality of representation to include:

- Adopted more uniform rates of compensation and detailed billing policies in capital and non-capital cases
 - Improved the collection of revenues from recoupment
 - Established higher qualification standards for attorneys seeking appointment to capital cases and appeals
 - Established new public defender offices in a number of counties and expanded some existing offices
 - Worked with the public defender offices to develop plans for the appointment of counsel that provide for more significant oversight of the quality and efficiency of local indigent representation
 - Adopted a model indigent appointment plan for non-public defender districts
 - Provided judges with studies on the average amount of time and frequency distributions of times claimed by private attorneys by type of case
 - Conducted a study on the cost of attorney time spent waiting in court under current scheduling systems
 - Studied trends in overall court dispositions and indigent dispositions
- The Commission and IDS Office are also in the process of working on a number of other initiatives to include:
 - Studied trends in overall court dispositions and indigent dispositions
 - Conducting an analysis of budgetary trends and current indigent defense spending levels
 - Conducting a study of misdemeanors that might be appropriate for reclassification as infractions
 - Developing a pilot system for the electronic submission of fee applications
 - Developing guidelines to assist judges in improving the indigency screening process
 - Developing an objective tool to measure the quality and efficiency of indigent defense systems at the county, regional, and statewide levels.
- The Commission and staff understand that the State is continuing to face a serious budget crisis and are working hard to identify additional ways to enhance efficiencies and minimize expenditures in the coming years. Any projections for the future, however, will be affected by other changes in the criminal justice system. For example, significant changes in sentencing, criminal law or procedure, or in the conduct of district attorney offices, might increase or decrease the funds needed for indigent defense. Similarly, some changes that could control costs for indigent defense will necessarily be systemic and involve not just defense counsel, but prosecutors, judges, clerks, and other system actors.

Oklahoma – April 14, 2010 (The Daily Oklahoman) - Oklahoma Indigent Defense System struggles to survive cuts

- State agency directors are still struggling to make ends meet and bracing for another round of cuts despite optimism expressed by state leaders because of an increase in revenue collections.
- The Director of the Oklahoma Indigent Defense System, said a lean budget means his agency doesn't have enough money to move from the hall which the agency occupies on the campus of Griffin Hospital in Norman.
- The state is consolidating its operations in Norman to cut down on expenses and is closing that building. "We're kind of in a dilemma," the director said. "We don't have the funds to move. We're hoping the Legislature will appropriate the money. Otherwise we're on the horns. I don't know what we'll do."
- Finding the money to move is just one more worry for the agency that is required to represent people facing criminal charges but who can't afford an attorney.
- Like most state agencies, indigent defense saw its budget for the 2010 budget year reduced by about 7.5 percent. The department's budget went from \$16 million to \$14.5 million.
- After nearly seven months of declining revenue, legislators drafting the budget for next year are warning that some agencies could see their budgets cut by an additional 10 percent. "It's getting to a real critical point," the director said. "We're told our budget is going to be cut further. We really can't take any more personnel cuts. We're down to figuring out what services can be eliminated."
- The Oklahoma Indigent Defense System has 115 employees, including 61 attorneys who represent people facing the death penalty, first-degree murder charges and appeals. The average attorney handles about 400-500 cases per year. Attorneys are paid \$45,000-\$90,000 a year. The agency handled more than 44,000 cases last year.
- The agency also contracts with local attorneys to represent people facing other criminal charges. "We can't afford to hire anybody else. We just keep asking more and more of our employees," the director said. "We're looking at what services we're not going to provide. These people still have to be represented. The state can't prosecute people if they can't provide defense."
- The Director said he's met with legislative leaders to explain his agency's plight, but still have not heard if the agency will get additional money to begin negotiating a new lease and starting the moving process. "The goal of public safety is to identify people who are criminals and address that," the Director said. "When you have this kind of a funding problem, it's addressed based on what we have money to do, and that's very dangerous."

Texas – February 25, 2011 (National Legal Aid & Defender Assoc.) – Chief Justice speaks out on indigent defense

- On February 23, 2011, Texas Supreme Court Chief Justice Wallace B. Jefferson gave his state of the judiciary before the 82nd state legislature.
- Texas has two high courts – the Supreme Court for civil and juvenile matters, and the Court of Criminal Appeals for criminal matters. Though Justice Jefferson heads the civil high court, he nonetheless felt compelled to speak about indigent defense needs in the state.
- The Chief Justice called for action on indigent defense noting that Texas has had more prisoners exonerated by DNA evidence over the last 10 years than any other state, but that it ranks among the lowest in the nation on funds spent for indigent defense. He called upon legislators to fund programs and pass laws to ensure innocent people do not wrongfully suffer at the hands of Texas's legal system.
- Bemoaning the fact that Texas ranks among the lowest of the 50 states in right to counsel per capita expenditures, he urged the legislature not to go forward with projected cuts to the indigent defense budget.
- The right to counsel is primarily a county responsibility in Texas, with the state making limited contributions through the Texas Task Force on Indigent Defense, which provides state funding, requires local planning for indigent defense and reporting of expenditures, and provides resources for counties to improve these services.
- A cut to their budget would drain the system of resources we need to assure indigent criminal defendants get competent lawyers who make the system fair.

Note: The Texas Indigent Defense Commission replaced the Task Force on Indigent Defense on September 1, 2011.

- The Texas Indigent Defense Commission provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law. In addition, it requires local planning for indigent defense and reporting of expenditures and provides an array of resources for counties to improve these services. In exchange for state fiscal assistance, the local judiciary is required to report its plan for delivering indigent defense services.

ENDNOTES

¹ MGL c 277 s 70C; Report of the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, executive summary, April 2005 p. 2. The Commission is almost always referred to in shorthand as “the Rogers Report” which is the name of its chairman, former House of Representatives majority leader, John Rogers.

² Report of The Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, April 2005, Massachusetts General Court, P4; Pamphlet provided to HPAO quoting text and footnote of Material Prepared in Response to an Information Request From the Civil Infraction Commission Prepared by the: Massachusetts Sentencing Commission February 2011, footnote Committee for Public Counsel Services, *Assigned Counsel Manual*, pages 3-4.

³ Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, April 2005; Material prepared in response to an information request from the Civil Infraction Commission, prepared by the: Massachusetts Sentencing Commission, February 2011 (made available to HPAO Bureau upon its request).

⁴ See letter: Chief Justice Boston Municipal Court, (BMC) to HPAO Chairman, 2 June 2011; various telephone conversations of District and BMC court personnel with HPAO Bureau director, June, July 2011. The AOTC’s Director of Court Operations and the chief justice of the District Court advised the HPAO Committee that its “request for statistical information” was most readily available from the AOTC which would assemble and provide the statistics to the HPAO Committee through its Bureau.

⁵ Email from executive director of the AOTC to the HPAO Bureau director, 7 June 2011

⁶ Material Prepared in Response to an Information Request from the Civil Infraction Commission Prepared by the: Massachusetts Sentencing Commission, Administrative Office of the Trial Court, February 2011

⁷ Email AOTC, Executive Director to HPAO Bureau Director, 7 June 2011

⁸ Email from executive director of the AOTC to the HPAO Bureau director, 7 June 2011; The statistics used in this report contain references to both fiscal year and calendar year. The HPAO Bureau requested that clarification in its initial surveys. The batch of statistics supplied to the HPAO Bureau in early June noted that the data supplied was from 2010 and that this data represented a “calendar year” of statistics for misdemeanors amended to civil violations. A calendar year consists of all days of a year between the first day of January through and including the last day of December. The HPAO Bureau echoes the AOTC caution that other court statistics, both provided to it and statistics displayed on the Massachusetts Judicial Branch’s website, also use fiscal year data (in Massachusetts the state’s fiscal year data is assembled within 1 July through and including 30 June). This data is found in the “Trial Court Case Statistics Directory” available on the Massachusetts Court System Website. For example, the statistics provided to the HPAO Bureau in September 2011 used, in examining the AOTC, fiscal year statistics. The HPAO Bureau used the fiscal year statistics in its analysis of the AOTC revenue reconciliation management reports. Other examples periodically appear in this report. Consequently, care must be used when using the AOTC statistics to determine that the data is comparable. This issue adds an obstacle to auditing the indigency defense counsel issue.

⁹ Email; AOTC executive director to HPAO Bureau director, 20 June 2011; Attachment: Material Prepared in Response to an Information Request from the Civil Infraction Commission Prepared by the: Massachusetts Sentencing Commission, Administrative Office of the Trial Court, February 2011

¹⁰ Email AOTC executive director to HPAO Bureau director, 20 June 2011 with attachment: “Material Prepared in Response to an Information Request from the Civil Infraction Commission: Prepared by the: Massachusetts Sentencing Commission, February 2011, p7”

¹¹ Email from AOTC executive director to HPAO Bureau director, 7 June 2011, with attachment of “Charges Amended to Civil Complaints under c. 277 s. 70C, Charges Arraigned Calendar Year 2010” document

¹² MDAA letter 27, June 2011

¹³ Email, AOTC Executive Director to HPAO Bureau Director, 30 June 2011

¹⁴ Appendix F contains data supplied by the Committee on Public Counsel Services (CPCS) for the House Committee on Post Audit and Oversight for Fiscal Year 2011. The data references 188 instances that involved a single charge for which CPCS paid an attorney to represent an indigent client. Because the data was reformatted to make the appendix pages more readable, the placeholder numbers exceed the 188 single misdemeanor charges.

¹⁵ Email from Executive Director of the AOTC to HPAO Bureau Director with attachment of report and question responses, 1 Sept. 2011. “The second document provides further analysis of the c. 277 sec. 70C cases based on a more systematic sample - i.e., 17,042 cases disposed under this provision from Jan. 2008 to June 2011. By focusing on these years, we avoid the legacy system problems which we discussed.”; and, the attachment, Administrative Office of the Trial Court Further Analysis of Dispositions Pursuant to c. 277 § 70C, 1 September 2011: “Of the original 19,458 charges, 17,042 were disposed of from 2008 through June 2011. These cases represent the most systematic compilation of c. 277 s 70C dispositions because the transition from the WMS legacy system to MassCourts was complete by 2008. Therefore, the remaining analysis focuses only on those charges resolved from 2008 through June 2011.”

¹⁶ Email from executive director of the AOTC to HPAO Bureau director with attachment of report and question responses, 1 Sept. 2011. “In response to your more recent request, we also isolated the crimes of Disturbing the Peace and Disorderly Conduct and compared the number of dispositions under c. 277 sec. 70C for these crimes with the number of arraignments for these crimes. Finally, we broke down these Disturbing/Disorderly dispositions under c. 277 sec. 70C by the specific court divisions.”

¹⁷ Material Prepared in Response to an Information Request From the Civil Infraction Commission Prepared by the: Massachusetts Sentencing Commission, February 2011, p. 4.

¹⁸ Civil Infraction Commission meeting minutes, July 5, 2011; Material Prepared in Response to an Information Request from the Civil Infraction Commission (pamphlet), prepared by the: Massachusetts Sentencing Commission February 2011; HPAO Bureau attendance at the regular meetings of the Massachusetts Civil Infractions Commission

¹⁹ While all District Attorneys responded to the HPAO survey, only two district attorneys completed the HPAO survey response tool/form. The others responded to the survey in letter form. The two district attorney’s offices who used the survey - Norfolk and Northwestern district - indicated that the statistics that their office kept were based upon calendar year; all other district attorneys’ responses were silent on their method of statistical collection (usually either calendar or fiscal year), or stated that the office did not have statistics to quote.

²⁰ Massachusetts District Attorney's Association (MDAA) letter to chairman, House Committee on Post Audit and Oversight, dated 27 June 2011; The MDAA responded in letter form, rather than the HPAO survey, and represented the District Attorneys of Berkshire, Bristol, the Cape and Islands, Essex, Hampden, and Plymouth. The District Attorneys of Norfolk, Middlesex, Northwest, Worcester and Suffolk responded individually either by letter or returned the HPAO Bureau's survey instrument. Several district attorneys or members of their staff also placed telephone calls to the HPAO Committee and its Bureau.

²¹ Massachusetts District Attorney's Association (MDAA) letter to chairman, House Committee on Post Audit and Oversight, dated 27 June 2011

²² Also "a justice, associate justice or special justice thereof, or by a clerk, assistant clerk, temporary clerk or temporary assistant clerk..." See MGL c 218 s 35A

²³ Massachusetts District Attorney's Association (MDAA) letter to chairman, House Committee on Post Audit and Oversight, dated 27 June 2011

²⁴ Suffolk District Attorney, survey letter response to HPAO Committee, dated 19 August 2011

²⁵ Worcester District Attorney, survey letter response to HPAO Committee, dated 5 July 2011

²⁶ Worcester District Attorney, letter to HPAO Committee, dated 5 July 2011. Worcester County District Court had the highest use of MGL c. 277 s 70C during the last four years. There were 6,658 cases of charges amended from criminal misdemeanor to civil infractions in Worcester District Court, according to statistics provided to the HPAO Bureau in September by the Administrative Office of the Trial Court.

²⁷ Office of the Middlesex District Attorney's chief legal counsel to Chairman, House Post Audit and Oversight Committee, 10 June 2011

²⁸ Massachusetts District Attorney's Association (MDAA) letter to chairman, House Committee on Post Audit and Oversight, dated 27 June 2011

²⁹ Office of the Middlesex District Attorney's Director of Administration and Finance to analysts, Massachusetts House and Massachusetts state Senate committees on Ways and Means, (two letters) dated 3 June 2011 and 8 April 2010. These letters were enclosed as attachments in correspondence from chief legal counsel of the Middlesex District Attorney's office to Chairman, HPAO Committee, 10 June 2011

³⁰ Office of the Middlesex District Attorney's Director of Administration and Finance to analysts, Massachusetts state House and Senate committees on Ways and Means, 3 June 2011

³¹ Middlesex District Attorney letter dated 8 April 2010 to Senate Committee on Ways and Means and House Committee on Ways and Means; Middlesex District Attorney letter dated 3 June 2011 to Senate Committee on Ways and Means and House Committee on Ways and Means; Both Middlesex District Attorney's letter to the ways and means staff was signed by an assistant district attorney and the director of the office's administration and finance department.

³² Letter to HPAO Chairman, from District Attorney of Suffolk County, 19 August 2011

³³ District Attorney of Suffolk County to Chairman, House Committee on Post Audit and Oversight, 19 August 2011

³⁴ Black's Law Dictionary, eighth edition, Thomson West, St. Paul, MN, p. 1464. "Sua sponte": (Latin: "of one's own will"). Without prompting or suggestion; on its own motion. e.g. the court took notice sua sponte that it lacked jurisdiction over the case. Correspondence: District Attorney of Suffolk County to Chairman, House Committee on Post Audit and Oversight, 19 August 2011

³⁵ Correspondence: District Attorney of Suffolk County to Chairman, House Committee on Post Audit and Oversight, 19 August 2011

³⁶ District Attorney of Suffolk County to Chairman, House Committee on Post Audit and Oversight, 19 August 2011; Worcester District Attorney to Chairman, House Committee on Post Audit and Oversight, 5 July 2011; Massachusetts District Attorney's Association (MDAA) letter to Chairman, House Committee on Post Audit and Oversight, dated 27 June 2011

³⁷ Statistics supplied to HPAO Bureau by the Administrative Office of the Trial Court; AOTC electronic mail to HPAO Director, 1 September 2011; Statistics available on the AOTC website indicate that in the fiscal years 2010-2008 there were a total of 663,970 criminal defendants in District Court and 255,911 criminal matters. This number is not exactly comparable because it is a fiscal year statistical reporting and the AOTC numbers does not indicate if the report provided to the HPAO Bureau used a fiscal year or calendar year tabulation methodology.

³⁸ "Report of The Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts", April 2005, Massachusetts General Court; Massachusetts Governor's Website, House 1 - FY2012, Budget Recommendation [<http://www.mass.gov/bb/h1/fy12h1>]

³⁹ Email and attachment; AOTC director of fiscal affairs to HPAO Bureau director, 20 October 2011.

⁴⁰ Statistics provided to the HPAO Committee by the House Ways and Means Committee.

⁴¹ Statistics provided to the HPAO Committee by the House Ways and Means Committee.

⁴² "Report of The Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts", April 2005, Massachusetts General Court, p. 6

⁴³ "Report of The Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts", April 2005, Massachusetts General Court, p. 6

⁴⁴ Interview with state Representative John Rogers, HPAO Bureau, Wednesday, 11 May 2011

⁴⁵ CPCS FY 2012 budget document, Response to HPAO Bureau, 29 July 2011; MGL Chapter 54 Section 2 of the Acts of 2005; also, see: website for Committee on Public counsel, CPCS Assigned Counsel Manual Chap. 5 sec. 33 available at: http://www.publiccounsel.net/Certification_Requirements/pdf/MANUALCHAP5_sec33.pdf]

⁴⁶ Governor's Budget Recommendations, FY 2012, Indigent Defense Reforms, Executive Office for Administration and Finance. Available at: http://www.mass.gov/bb/h1/fy12h1/exec_12/hbudbrief22.htm

⁴⁷ MGL c 276 s 99E; see also MGL 211D section 2

⁴⁸ HPAO Bureau letters to Massachusetts' Commissioner of the Departments of Revenue, and Commissioner of the Transitional Assistance, the Medical Director of the Massachusetts Department of Medicaid, and the Registrar of Motor Vehicles, 18 May 2011

⁴⁹ Acting General Counsel for the Commissioner, Massachusetts Department of Transitional Assistance, response letter to, Director, HPAO Bureau, 24 May 2011

⁵⁰ Medicaid Director, Office of Medicaid, Executive Office of Health and Human Services, response letter, to Director, HPAO Bureau, 6 June 2011.

⁵¹ Letter, Registrar of Motor Vehicles, to Director, HPAO Bureau, 23 May 2011

⁵² Letter from Tax Counsel, Department of Revenue, Litigation Bureau, to Director, HPAO Bureau, 24 June 2011

⁵³ Letter from Tax Counsel, Department of Revenue, Litigation Bureau, to Director, HPAO Bureau, 24 June 2011

⁵⁴ Memorandum, Interim Indigency Verification Protocol Change, Office of the Commissioner of Probation, to Chief Probation Officers, Probation Officers in Charge, of the Superior, District, Boston Municipal and Juvenile Court Departments, 24 August 2004

⁵⁵ Memorandum, Interim Indigency Verification Protocol Change, Office of the Commissioner of Probation, to Chief Probation Officers, Probation Officers in Charge, of the Superior, District, Boston Municipal and Juvenile Court Departments, 24 August 2004

⁵⁶ Memorandum, Interim Indigency Verification Protocol Change, Office of the Commissioner of Probation, to Chief Probation Officers, Probation Officers in Charge, of the Superior, District, Boston Municipal and Juvenile Court Departments, 24 August 2004

⁵⁷ Email, Office of Commissioner of Probation to director, House Post Audit and Oversight Bureau, 18 October 2011; State House News Service, 31 December 2010

⁵⁸ Email, Office of the Commissioner of Probation to Director, House Post Audit and Oversight, 18 October 2011

⁵⁹ Email, Office of the Commissioner of Probation to Director, House Post Audit and Oversight, 18 October 2011

⁶⁰ Telephone conversation of First Deputy Commissioner of Probation with Director, HPAO Bureau, 18 October 2011

⁶¹ Reported Indigency Figures, research department, Office of the Commissioner of Probation, 19 October 2011, report provided to HPAO Bureau

⁶² Interview, Office of the Commissioner of Probation, with HPAO Bureau, 19 October 2011. The Office of the Commissioner of Probation explained that the categories of “Reduced Indigency Counsel Fee” and “Average reduced Counsel Fee” in the chart are not compatible. The collection activity for the categories of “Reduced Indigency Counsel Fee” is done by the District and BMC court clerks with the exception of the ten courts not yet using the MassCourts system. The “Average Reduced Counsel Fee” refers to only those collections in the ten courts not yet using MassCourts, where the collection of the indigent defense counsel fee continues to be performed by the Probation Department.

⁶³ Governor’s budget Recommendations, FY 2012, Indigent Defense Reforms, Executive Office for Administration and Finance. Available at: http://www.mass.gov/bb/h1/fy12h1/exec_12/hbudbrief22.htm

⁶⁴ **FY2012 House 1 Budget Recommendation: Issues in Brief, Governor of the Commonwealth, 26 January 2011**; Source: http://www.mass.gov/bb/h1/fy12h1/exec_12/hbudbrief22.htm The Governor's budget was filed on Wednesday, 26 January 2011.

⁶⁵ **FY2012 House 1 Budget Recommendation: Issues in Brief, Governor of the Commonwealth, 26 January 2011**; Chapter 68, Acts of 2011

⁶⁶ Emails from Acting Commissioner of Probation, 18 October 2011 to Director, HPAO Bureau First Deputy Commissioner of Probation, 18 October 2011 to Director, HPAO Bureau

⁶⁷ **FY2012 House 1 Budget Recommendation: Issues in Brief, Governor of the Commonwealth, 26 January 2011**; Source: http://www.mass.gov/bb/h1/fy12h1/exec_12/hbudbrief22.htm

⁶⁸ Prosecutors, Public Defenders Question Guv's Planned Legal Agency", State House News Service, Boston, Monday, 24 January 2011

⁶⁹ Prosecutors, Public Defenders Question Guv's Planned Legal Agency, State House News Service, 24 January 2011.

⁷⁰ MGL c 261 s 27A (b)

⁷¹ Memorandum, SJC, to Commissioner of Probation, 26 January 2011 and memo Attachment: Federal Register of January 20, 2011, Volume 76, Number 13, at pages 3637-3638.

⁷² Chapter 68, s 112 subsection 2, Acts of 2011, Letter, Registrar of Motor Vehicles, from Director, HPAO Bureau, 18 May 2011; RMV letter 23 May 2011; HPAO Bureau, 23 May 2011; Interview, Office of the Commissioner of Probation, 15 July 2011

⁷³ Telephone interview, First Deputy Commissioner of Probation, with HPAO Director, 18 October 2011

⁷⁴ Email: HPAO Director to DTA, 3 November 2011

⁷⁵ Letter, Executive Office for Administration and Finance, Fiscal Affairs Division Director, to HPAO Bureau Director, 17 August 2011

⁷⁶ HPAO Director to DTA, 3 November 2011

⁷⁷ The source of the documents was the Administrative Office of the Trial Court (AOTC) and the HPAO Bureau requested the Trial Court Revenue Reconciliation Management Reports for fiscal years, 2009, 2010, 2011, and 2012 (one month of results at the time of the HPAO Bureau's request).

⁷⁸ Disparity Examples by County. Excel Spreadsheet analysis by HPAO Bureau, from AOTC Trial Court Revenue Reconciliation Management Report documents for fiscal years, 2009, 2010, 2011, and 2012

⁷⁹ See also DeNavas-Walt, Carmen, Bernadette D. Proctor, and Jessica C. Smith, U.S. Census Bureau, Current Population Reports, P60-239, *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, U.S. Government Printing Office, Washington, DC, 2011.

Appendix A

Review of AOTC Revenue Reconciliation Reports for
Indigent Defense Counsel Fees:

FY 2009

FY 2010

FY 2011

District or Boston Municipal Court	3 year Average Criminal Defendants (AOTC statistics)	1999 Income per Capita (DOR)	FY2009 Indigent Defense (150) FY2009	FY2009 Indigent Legal Counsel Fee FY2009	FY2010 Indigent Defense (150) FY2010	FY2010 Indigent Legal Counsel Fee FY2010	FY2011 Indigent Defense (150) FY2011	FY2011 Indigent Legal Counsel Fee FY2011	TOTAL Reimburse Indigent Counsel 3 Fiscal Years	Average annual Reimburse Indigent Counsel 3 Fiscal Years	District or Boston Municipal Court
A3	12,360	N/A	(\$-300)	\$185,208.50	\$0.00	\$188,684.00	(\$-1450)	\$165,074.00	\$353,758.00	\$179,655.50	A3
A5	12,515	\$15,232.00	\$38,311.44	\$226,004.00	\$35,551.00	\$191,077.36	\$44,396.00	\$161,217.00	\$696,556.80	\$232,185.60	A5
A7	4,941	\$22,660.00	\$178,800.00	\$18,440.00	\$139,139.89	\$28,995.00	\$31,048.16	\$104,411.28	\$500,834.33	\$166,944.77	A7
A9	8,536	\$17,557.00	\$99,044.15	\$310,488.07	\$94,593.03	\$277,846.96	\$65,165.00	\$236,978.76	\$1,084,115.97	\$361,371.99	A9
A11	9,434	\$15,602.00	\$0.00	\$258,463.00	\$0.00	\$244,512.00	\$0.00	\$286,922.62	\$789,897.62	\$263,299.20	A11
A13	601	\$31,314.00	\$5,865.00	\$650.00	\$9,140.00	\$785.00	\$5,575.00	\$50.00	\$22,065.00	\$7,355.00	A13
A14	1,133	\$25,740.00	\$425.00	\$8,525.00	\$0.00	\$8,218.00	\$1,765.00	\$10,945.00	\$29,878.00	\$9,959.33	A14
A15	2,222	\$29,553.00	\$12,585.00	\$50,064.00	\$12,800.00	\$58,560.73	\$11,886.67	\$61,797.51	\$207,693.91	\$69,231.30	A15
A17	11,355	\$18,614.00	\$0.00	\$350,456.54	\$0.00	\$272,288.50	\$5,605.00	\$239,648.26	\$867,998.30	\$289,332.76	A17
A19	7,004	\$17,492.00	(\$-150.00)	\$306,791.44	\$3,945.00	\$294,518.00	\$4,125.00	\$341,831.00	\$951,060.44	\$317,020.14	A19
A21	3,998	\$15,913.00	\$0.00	\$121,746.76	\$0.00	\$112,403.50	\$0.00	\$123,679.62	\$357,829.88	\$119,276.62	A21
A22	899	\$44,327.00	\$23,313.00	\$3,938.00	\$11,064.32	\$28,116.34	\$7,144.00	\$37,138.68	\$110,714.34	\$36,904.78	A22
A23	8,803	\$17,163.00	\$16,807.20	\$339,515.30	\$19,470.80	\$365,372.83	\$19,882.00	\$314,454.52	\$1,075,502.65	\$358,500.88	A23
A27	2,620	\$18,830.00	\$9,085.00	\$86,805.00	\$13,215.00	\$105,268.75	\$18,957.83	\$104,106.74	\$337,438.32	\$112,479.44	A27
A28	3,183	\$18,908.00	\$2,261.00	\$47,674.00	\$2,400.00	\$46,099.00	\$1,100.00	\$60,170.53	\$159,704.53	\$53,234.84	A28
A30	1,724	\$22,655.00	\$4,362.50	\$13,605.00	\$18,771.00	\$5,180.00	\$14,888.63	\$6,156.47	\$62,963.60	\$20,987.87	A30

Appendix B

Charges Amended to Civil Complaints

under

MGL c 277 s 70C

for

Calendar Year 2010

Charges Amended to Civil Complaints under c. 277 s. 70C,
Charges Arraigned Calendar Year 2010

Offense	Number
All Charges Amended to Civil	2,932
Disorderly Conduct	838
Operate After Suspension	646
Shoplifting	450
Trespassing	293
Compulsory Insurance Violation	152
Attaching Wrong MV Plates	111
Possession Class D	76
Alcohol, Possession by Minor	57
Receiving Stolen Goods	50
Distribute Class D	37
Resisting Arrest	36
Possession Class D Marijuana	35
Prostitution	21
Littering	14
Larceny Less	12
RV On Public Way	10
Threatening	9
Failure To Return Leased Prop	9
Alcohol, Procure for Minor	9
Habitual Traffic Offender	6
Possession Class B	5
Obstruct Emergency Veh	5
Fireworks	5
MDC Rule Violation	5
Operate After Suspension 2nd	4
Identification Violation	4
Refuse ID Process	4
License Law Violation (Not MV)	3
Lewd And Lacious	2
Alcohol, Transporting	2
False Report Of Crime	2
MV - False Report Of Theft	1
Defrauding Innkeeper	1
Vandalism	1
Tagging Property	1
Possession Class N.A.	1
Possession Class A Heroin	1
Possession Class C	1
Possession Class D 2nd	1
Possession Class D Marijuana 2nd	1
Possession Class E	1
Inhaling Toxic Vapors	1
Violation Aircraft Restriction	1
Common Night Walker	1
Indecent Exposure	1
Possess Air Rifle w/o FID Card	1
Annoying Phone Calls	1
Obstructing Justice	1
Interfere Police or Firefighter	1
False Alarm	1
City Ordinance Violation	1

Appendix C

Flow Chart

regarding

Massachusetts Indigency Verification Process

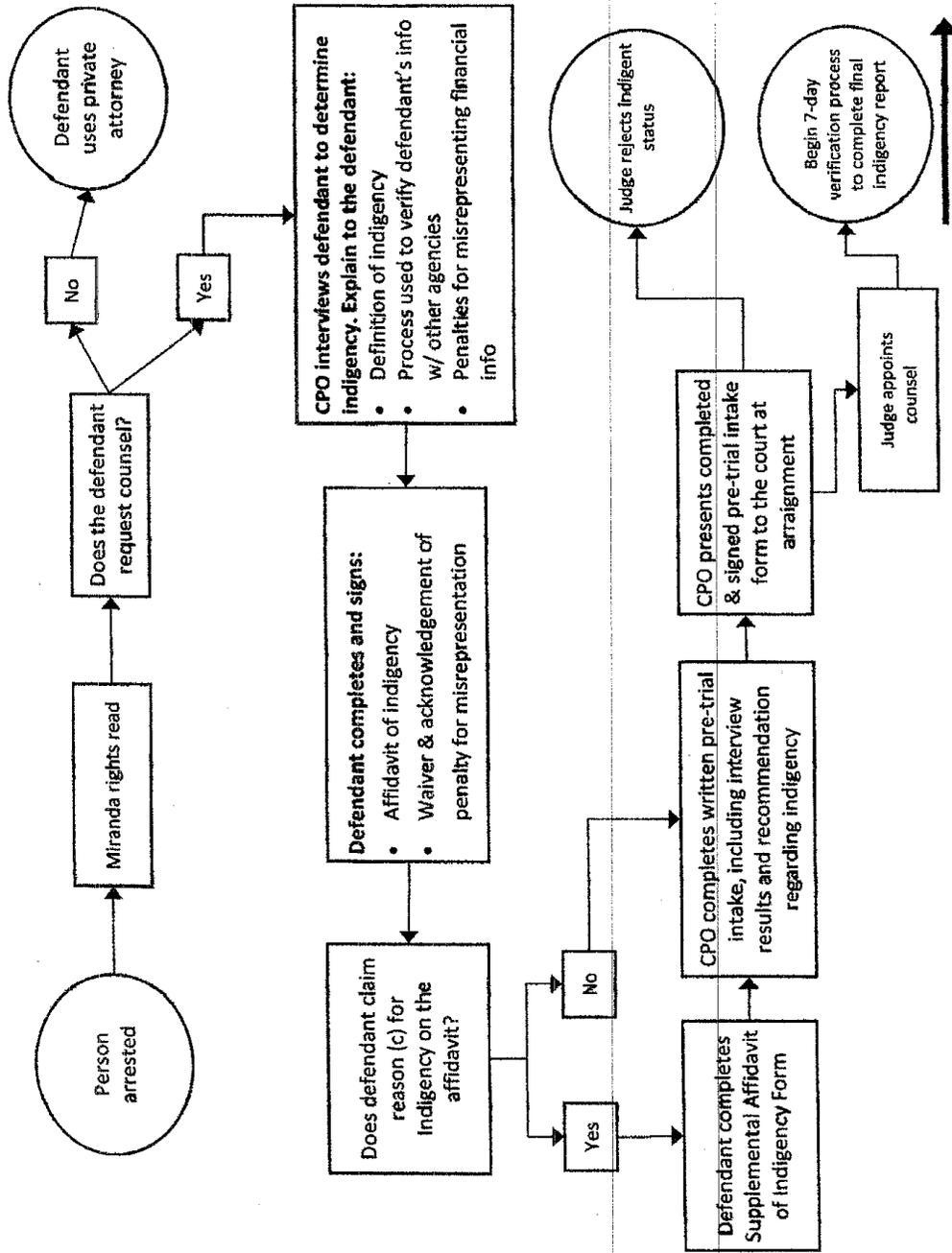
draft copy by

Kennedy School of Government

for

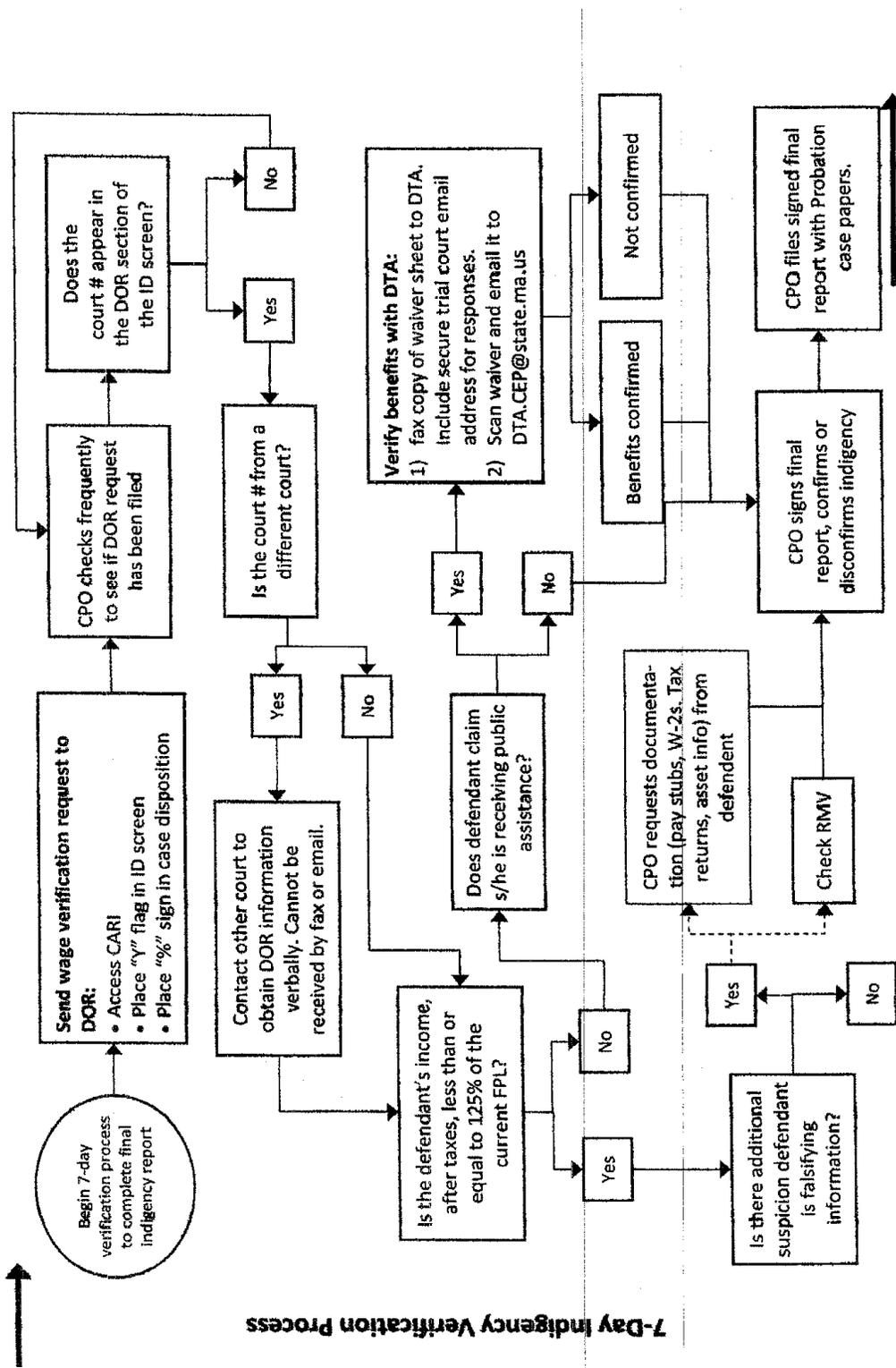
Office of the Commissioner of Probation

MA Indigency Verification Process—Draft



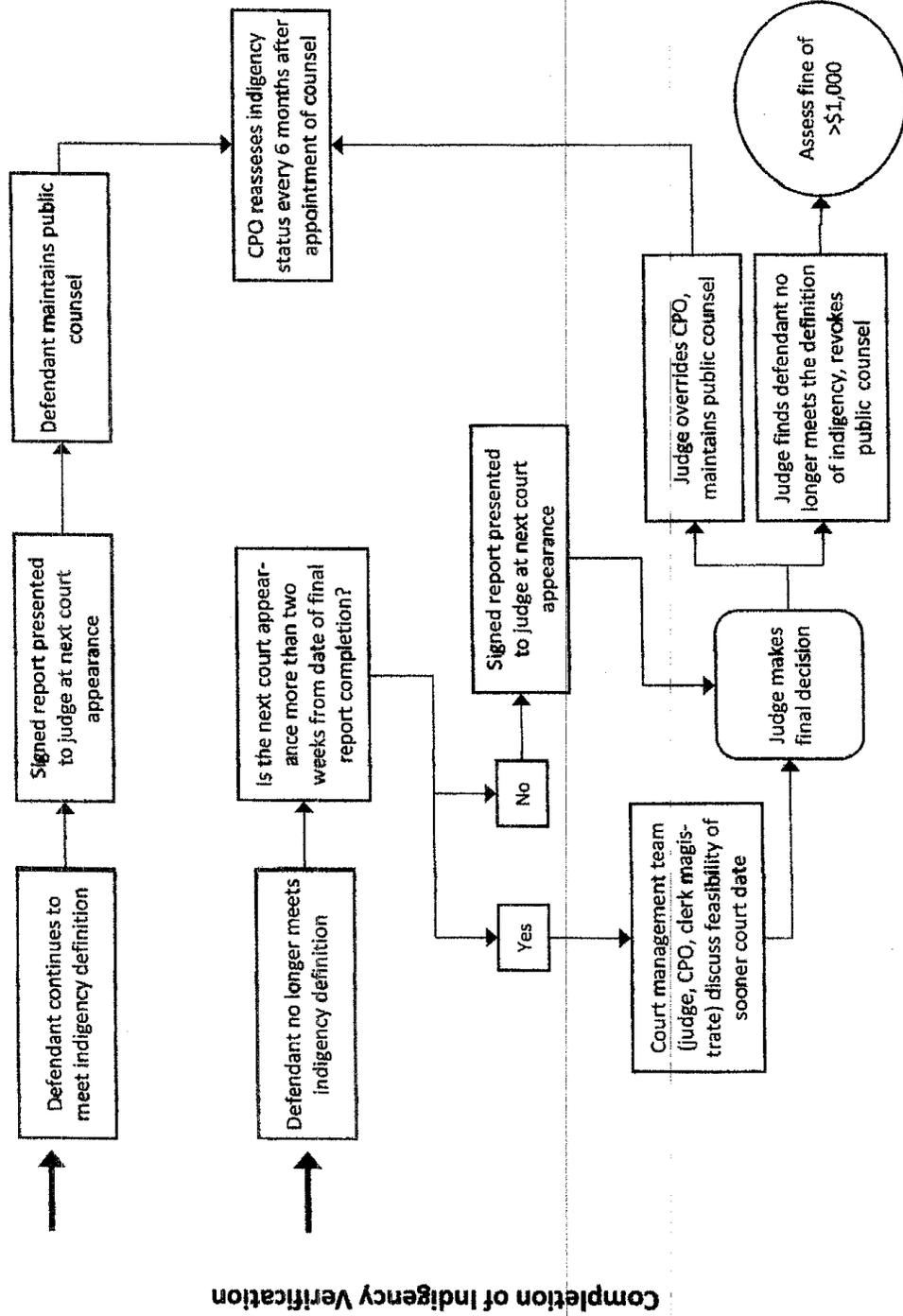
Pre-Arraignment Process

MA Indigency Verification Process — Draft



7-Day Indigency Verification Process

MA Indigency Verification Process—Draft



Completion of Indigency Verification

Appendix D

2004 Commissioner of Probation: Interim Indigency Verification
Protocol Change

1990 AOTC on Indigency Fee Collection



Massachusetts Trial Court
Office of the Commissioner of Probation
One Ashburton Place
Boston, MA 02108-1612

JOHN J. O'BRIEN
COMMISSIONER

TEL: (617) 727-5300
FAX: (617) 727-8483

TO: Chief Probation Officers, Probation Officers in Charge, of the Superior,
District, Boston Municipal and Juvenile Court Departments

FROM: *JJO* John J. O'Brien, Commissioner

DATE: August 24, 2004

RE: Interim Indigency Verification Protocol Change

I would like to express my gratitude for your efforts in implementing the interim indigency verification protocol established to comply with the amended Mass. Gen. Laws. c. 211D, § 2 ½. The additional responsibility placed on the field by the protocol did not go unnoticed by this office, and I am proud of the professional manner that Chief Probation Officers have demonstrated in meeting this challenge. As my August 12th memo indicated, the protocol is the subject of an ongoing discussion between the Administrative Office of the Trial Court, the Department of Revenue, the Department of Transitional Assistance, the Department of Medical Assistance, the Registry of Motor Vehicles, and this office. A result of this conversation is a shift in the protocol regarding the need to request information from these agencies.

As of this date, a Chief Probation Officer, or his or her designee, does not have to request information from the agencies on all claims of indigency. The investigating officer may now use his or her discretion, based on his or her experience and training, on when to involve the agencies in the investigation of an indigency claim. This change does not negate the necessity of having the defendant read and sign the Definition of Indigency and Acknowledgment of Penalties for Misrepresentations Form and the Waiver Authorizing Release of Information to Verify Claim of Indigency. Probation Officers should also continue to use past methods of determining indigency when assessing the defendant's need for counsel.

Thank you for your continued patience as we adjust to the provisions of this new legislation.



THE COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
OFFICE OF THE CHIEF ADMINISTRATIVE JUSTICE
Two Center Plaza
Boston, Massachusetts 02108

TO: Administrative Justices of the Trial Court
First Justices of the Trial Court
Clerk/Magistrates of the Trial Court
Chief Probation Officers of the Trial Court
Commissioner of Probation

FROM: *[Signature]* Arthur M. Mason, Chief Administrative Justice

DATE: August 22, 1990

RE: Fiscal Year 1991 - Legal Counsel Fee
Fiscal Year 1991 Memo #6

Recent legislation has created an additional revenue source for Court Divisions to collect and submit to the State Treasurer. Chapter 211D, Section 2A as amended establishes an additional assessment for deposit to the Committee for Public Counsel Services.

Chapter 211D, Section 2A as amended by St. 1990, Chapter 150, Section 330 which states that, "Any person provided counsel under the provisions of this Chapter shall be assessed a legal counsel fee of forty dollars (\$40.00) which may be waived at the discretion of the court. Said fee shall be in addition to any reduced fee required pursuant to Section Two (2) and shall be collected in accordance with said Section".

Each division should collect and record this item separately. It is necessary to segregate the receipting process for this item and to have the ability to identify the category account for future inquiries.

The submission of this revenue will be done by using the receipt account number established for your court for the "Reimbursement for Indigent Counsel."

If you have any questions concerning this matter, please contact John J. Morrissey, Director of Fiscal Affairs, Robert E. Maguire, Manager of Fiscal Affairs/Audit & Payroll or your Fiscal Affairs Internal Auditor at 1-800-572-5027 or 1-800-222-5178

JJM/jm

maguire.45

cc: John J. Morrissey, Director of Fiscal Affairs
Robert E. Maguire, Manager of Fiscal Affairs/Audit & Payroll
Bookkeeping Personnel of the Trial Court

Appendix E

Current Law

Massachusetts General Laws c 211D s 2A & s 2B

Chapter 211D Committee for Public Counsel Services

Section 2A Legal counsel for criminal defendant charged with misdemeanor or municipal ordinance violation; fee assessment

Section 2B Appointment of counsel for criminal defendant charged with misdemeanor or municipal ordinance or bylaw violation

[Text of section added by 2011, 68, Sec. 112 effective July 1, 2011. See 2011, 68, Sec. 221.]

- **PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES**
(Chapters 211 through 262)
- **TITLE I COURTS AND JUDICIAL OFFICERS**
- **CHAPTER 211D COMMITTEE FOR PUBLIC COUNSEL SERVICES**
- **Section 2A** Legal counsel for criminal defendant charged with misdemeanor or municipal ordinance violation; fee assessment

[Text of section effective until July 1, 2011. For text effective July 1, 2011, see below.]

Section 2A. Notwithstanding any other provision of law, a criminal defendant charged with a misdemeanor or a violation of a municipal ordinance or bylaw, on motion of the commonwealth, the defendant, or on the court's own motion, shall not be appointed counsel if the judge, at arraignment, informs such defendant on the record that, if the defendant is convicted of such offense, his sentence will not include any period of incarceration. For good cause, that judge or another judge of the same court may later revoke such determination on the record and appoint counsel, and on the request such counsel shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial. Any such determination or revocation by a judge shall be endorsed upon the docket of the case.

Any person provided counsel under the provisions of this chapter shall be assessed a counsel fee of \$150, which may be waived at the discretion of the court. Said fee shall be in addition to any reduced fee required pursuant to section two and shall be collected in accordance with said section.

The department of revenue shall be authorized to intercept said fee from tax refunds due to persons who have not paid said fee.

The department of public welfare shall be authorized to deduct said fee in weekly or monthly increments from persons who have not paid said fee.

Chapter 211D: Section 2A. Verification of claim of indigency; waiver by claimant allowing access to information; reassessments following appointment of counsel; reporting

[Text of section as recodified by 2011, 68, Sec. 112 effective July 1, 2011. See 2011, 68, Sec. 221. For text effective until July 1, 2011, see above.]

Section 2A. (a) A person claiming indigency under section 2 shall execute a waiver authorizing the court's chief probation officer, or the officer's designee, to obtain the person's wage, tax and asset information from the department of revenue, department of transitional assistance and the registry of motor vehicles that the court may find useful in verifying the person's claim of indigency. The waiver shall authorize the chief probation officer, or the officer's designee, to conduct any further reassessment required by this section.

(b) It shall be the responsibility of the chief probation officer assigned to each court to ensure that a person claiming to be indigent meets the definition of indigency under section 2. A person seeking the appointment of counsel shall be interviewed by the chief probation officer or the officer's designee prior to the appointment of counsel. The person conducting the interview shall explain to the person seeking appointment of counsel: (1) the definition of indigency; (2) the process used to verify the person's information with other state agencies; and (3) the penalties for misrepresenting financial information in applying for the appointment of counsel. The officer or the officer's designee conducting the interview shall prepare a written indigency intake report that shall record the results of the interview and state a recommendation on whether or not the person seeking appointment of counsel is indigent. The person seeking appointment of counsel and the officer or the officer's designee conducting the interview shall sign the indigency intake report. In signing the report, the person seeking appointment of counsel shall certify under the pains and penalties of perjury that the information contained therein is true and that the person has not concealed any information relevant to the person's financial status. All statements contained in the report shall be deemed material statements. The completed report shall be presented to a judge who may adopt or reject the recommendations in the report, either in whole or in part.

(c) Appointment of counsel by a court shall, at all times, be subject to verification of indigency by the chief probation officer assigned to each court. The chief probation officer or the officer's designee shall, within 7 business days of appointment of counsel, complete a final report of the financial circumstances of the person for whom counsel was appointed containing wage, tax and asset information. In preparing the final report, the chief probation officer or the officer's designee may access, through electronic sharing of information pursuant to a memorandum of understanding, wage, tax and asset information in the possession of the department of revenue and the department of transitional assistance, and any other information relevant to the verification of indigency in the possession of the registry of motor vehicles. These departments shall provide this information to the chief probation officer or the officer's designee upon request. The chief probation officer shall sign the final report, certifying that the person for whom counsel was appointed either continues to meet or no longer meets the definition of indigency. Thereafter, the report shall be filed with the case papers and shall be presented to the judge presiding at the person's next court appearance; provided, however, that if a person for whom counsel was appointed is found to not meet the definition of indigency, a court appearance shall be scheduled as soon as feasible prior to the person's next court appearance if the next court appearance is more than 2 weeks from the date the final report is completed. If, upon receipt of the report, a judge finds that the person for whom counsel was appointed no longer meets the definition of indigency, the judge shall revoke the appointment of counsel and allow such person a reasonable continuance to obtain new counsel.

Not later than 6 months after the appointment of counsel, and every 6 months thereafter, the chief probation officer or the officer's designee shall conduct a further reassessment of the financial circumstances of the person for whom counsel was appointed to ensure that the person continues to meet the definition of indigency. The chief probation officer or the officer's designee shall prepare, sign and file a written report certifying that the person either continues to meet, or no longer meets, the definition of indigency.

[Third paragraph of subsection (c) added by 2011, 142, Sec. 22 effective October 27, 2011.]

Upon request of the department of children and families, the commissioner of probation shall provide to the department a copy of a person's indigency intake form, final assessment of financial circumstances, and any report certifying that the person either continues to meet or no longer meets the definition of indigency prepared by the chief probation officer in accordance with this section. The department shall only use these forms, assessments and reports for the purpose of completing eligibility determinations under Title IV-E of the Social Security Act. The commissioner of probation and the commissioner of

children and families shall jointly determine the process by which the department of children and families shall obtain and maintain these forms, assessments and reports. The department of children and families shall not disseminate, and shall prohibit dissemination of, such information for any purpose other than those set forth in this paragraph.

(d) If a criminal defendant is charged with a second or further offense while continuing to be represented by court-appointed counsel for a previously charged offense, the court in its discretion shall determine whether any further determination of indigency, other than the bi-annual reassessments required by the defendant's representation for the first offense, need be undertaken. Upon completion of a reassessment, the chief probation officer shall prepare a written report of the officer's findings. The chief probation officer shall sign the report, certifying that the defendant either continues to meet or no longer meets the definition of indigency. The report shall be filed with the case papers and shall be presented to the judge presiding at the defendant's next court appearance. If, upon receipt of the report, a judge finds that the defendant no longer meets the definition of indigency, the judge shall revoke the appointment of counsel and allow the defendant a reasonable continuance to obtain new counsel.

(e) If the court finds that a person has materially misrepresented or omitted information concerning the person's property or assets for purposes of determining indigency and that the person does not meet the definition of indigency, the court shall immediately terminate any assignment or appointment of counsel made under this chapter and shall assess costs of not less than \$1,000 against the person.

(f) A person provided counsel under this chapter shall be assessed a counsel fee of \$150, which the court may waive only upon a determination from officer's data verification process that the person is unable to pay such \$150 within 180 days. If, upon the biannual reassessment of the person's indigency, the court concludes that the person is able to pay the \$150 counsel fee of which the person obtained a waiver, the court shall revoke the waiver and reimpose the \$150 counsel fee. The fee shall be in addition to any reduced fee required pursuant to section 2.

(g) The court may authorize a person for whom counsel was appointed to perform community service in lieu of payment of the counsel fee. A person seeking to work off a counsel fee in community service shall perform 10 hours of community service, in a community service program administered by the administrative office of the trial court, for each \$100 owed in legal counsel fees, which may be prorated. Notwithstanding any general or special law to the contrary, a court proceeding shall not be terminated and the person shall not be discharged if the person owes any portion of the legal counsel fee imposed by this section. The clerk shall not release any bail posted on such court proceeding until the legal counsel fee is satisfied in accordance with this chapter.

(h) The clerk of the court shall, within 60 days of appointment of counsel, report to the department of revenue, the department of transitional assistance and the registry of motor vehicles the amount of any legal counsel fee owed by the person for whom counsel was appointed under this chapter. The department of revenue shall intercept payment of such fee from tax refunds due to persons who owe all or a portion of such fee. The registry of motor vehicles shall not issue or renew a person's driver's license or motor vehicle registration for any vehicle subsequently purchased by such person until it receives notification from the clerk of the court that the fee has been collected or worked off in community service.

(i) The office of the commissioner of probation shall submit quarterly reports to the house and senate committees on ways and means that shall include, but not be limited to: (a) the number of individuals claiming indigency who are determined to be indigent; (b) the number of individuals claiming indigency who are determined not to be indigent; (c) the number of individuals found to have misrepresented wage, tax or asset information; (d) the number of individuals found to no longer qualify for appointment of

counsel upon any re-assessment of indigency required by this section; (e) the total number of times an indigent misrepresentation fee was collected and the aggregate amount of indigent misrepresentation fees collected; (f) the total number of times indigent counsel fees were collected and waived and the aggregate amount of indigent counsel fees collected and waived; (g) the average indigent counsel fee that each court division collects; (h) the total number of times an indigent but able to contribute fee was collected and waived and the aggregate amount of indigent but able to contribute fees collected and waived; (i) the highest and lowest indigent but able to contribute fee collected in each court division; (j) the number of cases in which community service in lieu of indigent counsel fees was performed; and (k) other pertinent information to ascertain the effectiveness of indigency verification procedures. The information within such reports shall be delineated by court division, and delineated further by month

- **PART III** COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
(Chapters 211 through 262)
- **TITLE I** COURTS AND JUDICIAL OFFICERS
- **CHAPTER 211D** COMMITTEE FOR PUBLIC COUNSEL SERVICES
- **Section 2B** Appointment of counsel for criminal defendant charged with misdemeanor or municipal ordinance or bylaw violation

[Text of section added by 2011, 68, Sec. 112 effective July 1, 2011. See 2011, 68, Sec. 221.]

Section 2B. A person charged with a misdemeanor or a violation of a municipal ordinance or bylaw, on motion of the commonwealth, the person or on the court's own motion, shall not be appointed counsel if the judge, at arraignment, informs such person on the record that, if the person is convicted of such offense, the person's sentence shall not include any period of incarceration. For good cause, that judge or another judge of the same court may later revoke such determination on the record and appoint counsel, and on the request such counsel shall be entitled to a continuance to conduct any necessary discovery and to prepare adequately for trial. Any such determination or revocation by a judge shall be endorsed upon the docket of the case.

Appendix F

188 Single Misdemeanor Charges and Each Misdemeanor Charge Cost FY 2011

CHARGE DESCRIPTION	Total Cases	\$ Amount Paid
TOTALS	43,757	\$ 17,355,893.60

Produced for the HPAO Committee by the
Committee on Public Counsel Services (CPCS)

	B	C	D
1	CHARGE DESCRIPTION	Total Cases	\$ Amount Paid
2	ASSAULT AND BATTERY	11595	6,002,758.70
3	VIOLATION OF RESTRAINING ORDER	2331	1,158,843.20
4	OP. AFTER LIC/REG BEEN SUSP	2075	586,696.60
5	ILLEGAL POSS. OF CLASS B SUBSTANCE	1200	541,588.40
6	BAIL ONLY	8195	465,578.90
7	THREATENING TO COMMIT A CRIME	850	456,242.20
8	MENTOR CRIMINAL CASES	51	428,323.60
9	OPERATING UNDER INFL. OF LIQUOR	632	412,062.30
10	ILLEGAL POSS. OF A CLASS A SUBSTANCE	847	393,783.50
11	ClassB 32A(a) possess	442	392,103.10
12	ClassD 32C(a) int make,dist,poss	542	385,948.70
13	KNOWING FAILURE TO REG/VERIFY REG INFO	446	374,606.50
14	TRESPASS ON LAND, DWELLING, ETC	1045	257,168.60
15	BREAK & E NIGHT MV, BOAT, BUILD, INT. TO COMMIT A FEL.	427	247,869.40
16	LEAVING ACC. SCENE PROP.DAMAGE	494	236,612.90
17	LARCENY OF PROPERTY \$250 OR LESS	587	233,408.50
18	Shoplifting by Asportation \$100+ or 3rd OFF	640	202,508.90
19	Shoplifting by Concealing \$100+ or 3rd OFF	606	187,778.40
20	GRAFFITI LAW	440	183,125.20
21	A&B+60 DISABLED W INJURY	216	164,158.10
22	OP. UNDER INFL. OF LIQ. 3RD OR +	75	145,046.10
23	ClassA 32(a) make,dist,poss w intent	162	139,508.60
24	ASSAULT	294	134,369.90
25	PROSTITUTION	406	120,207.50
26	ENT W/O BK.NIGHT DWEL. INT FEL	221	120,058.90
27	OP. UNDER INFL. OF LIQUOR, 2ND	143	115,234.90
28	HARASSMENT PREVENTION ORDER, VIOLATE	221	112,127.10
29	BAIL PETITION/APPEAL	1524	109,960.90
30	ILLEGAL POSS. OF CLASS E SUBSTANCE	258	102,563.10
31	DISORDERLY PERSON	276	102,363.90
32	BREAK & E MV, BOAT, BUILD. DAY , INT. FELONY	141	100,649.60
33	Malicious Damage to Motor Vehicle	224	100,443.40

	B	C	D
34	CHARGE DESCRIPTION	Total Cases	\$ Amount Paid
35	RECEV. STOLEN PROP., \$100 OR LESS	208	95,380.40
36	HARASSMENT-CRIM-FIRST OFFENSE	130	91,839.20
37	Sex Offender Fail To Register, Level 2 or 3	110	89,693.00
38	A&B BODILY INJURY TO CHILD	55	89,205.70
39	poss firearm,rifle,shotgun,ammunition no ID card	106	86,753.10
40	DIST SCHOOL ASSEMBLY	273	84,074.50
41	REPRESENTING WITNESS	710	82,178.40
42	Lewd and Lascivious, Common Night/Street Walker, Accost or Annoy Oppos	232	80,163.40
43	ILLEGAL POSS. OF CLASS C SUBSTANCE	162	79,971.10
44	ASSAULT&BATTERY ON PUBLIC SERV.	88	77,806.90
45	ASSAULT & BATTERY ON POLICE	118	73,818.40
46	UNAUTHORIZED USE OF A M/V	185	72,071.40
47	OPER. A M/V NEGLIGENTLY ENDANGER	143	70,180.60
48	ILLEGAL POSS. CLASS B SUBSQ.	98	68,026.20
49	reckless behaviour,fail to act, injury,abuse child	58	65,008.50
50	BREAK & E MV, BOAT, BUILD. NIGHT INT. TO COMMIT MISD.	151	64,755.60
51	OPERATING UNDER THE INFL. OF DRUGS	64	58,329.90
52	MAL. DEST. OF PROP., \$250 OR LESS	146	58,264.10
53	RESISTING ARREST	111	53,956.20
54	KNOWINGLY BEING PRES HEROIN KEPT	86	53,049.20
55	OP. AFTER REVOC C90 VIOLATION	129	52,582.00
56	Shoplifting by Asportation 1st and 2nd OFF	176	47,764.50
57	PROSTITUTION, PAYMENT FOR SEX	151	46,188.50
58	CRUELTY TO ANIMAL	48	42,082.20
59	IDENTITY FRAUD	54	38,776.10
60	ILLEGAL POSS. OF CLASS D SUBSTANCE	90	35,550.30
61	MAKING ANNOYING TELEPHONE CALLS	83	34,699.20
62	LEAVING ACC. SCENE PERS. INJ.	49	34,041.70
63	SELL/DELIV. ALCOH. BEV. TO MINOR	56	32,922.30
64	INDECENT EXPOSURE	77	32,253.00
65	LARCENY OF RENTED PROP	85	32,005.50
66	POSSESS CHILD PORNOGRAPHY FIRST OFFENSE	22	31,778.80

	B	C	D
67	CHARGE DESCRIPTION	Total Cases	\$ Amount Paid
68	ClassC 32B(a) poss,make,dist,intent	42	31,705.40
69	Grant of Conditional Liberty Revocation	185	31,625.40
70	MINOR TRANSPORTING/CARRYING ALCOH.	85	27,893.10
71	FALSE REPORT TO P.O.	59	27,702.20
72	Possession of Oth. Dangerous Weap. in School build./grounds	56	27,168.50
73	TAGGING	75	25,268.40
74	CONTRIBUTING TO DELINQ. OF CHILD	46	24,613.00
75	OPERATING AN UNINSURED M/V	119	23,503.50
76	ClassD 32C(b) SUBSEQ int make,dist,poss class D	27	20,041.60
77	DISTURBING THE PEACE	76	18,704.40
78	Arrestee Furnish False Name/SSN	60	18,012.50
79	Shoplifting by Concealing 1st and 2nd OFF	66	15,717.60
80	AFFRAY	39	15,205.00
81	ClassE 32D(a) poss,make,dist,int	25	15,141.20
82	ENTICING A CHILD	9	13,614.40
83	OPERATING A M/V RECKLESSLY	29	13,468.00
84	RESOURCE ATTORNEY	100	13,299.00
85	Burn pers prop or motor vehicle	12	12,951.20
86	Permit Substantial Injury to Child	7	12,823.80
87	Fugitive From Justice Without Warrant	63	11,903.60
88	LARCENY FALSE PRETENSES < 250	33	11,698.00
89	OP. UNDER INFL.OF DRUGS, 3RD OR +	10	11,559.00
90	FALSE CREDIT CARD \$250 OR LESS	23	11,025.60
91	BREAK & E MV, BOAT, BUILD. DAY INT. TO COMMIT MISD.	32	10,249.20
92	ClassE 32D(b) SUBSEQ poss,make,dist,int	19	9,576.80
93	CREATING/DIST. COUNTERFEIT SUBST.	30	8,968.50
94	LICENSE REVOKED AS HTO, OPERATE MV WITH c90 23	30	8,733.00
95	OPERATING A MV WITHOUT A LICENSE	39	8,401.40
96	FAILURE TO APPEAR	32	7,887.50
97	DISORDERLY CONDUCT, SUBSQ. OFF.	17	7,402.00
98	RESISTING ARREST	21	7,140.60
99	A & B ON EMT	13	6,945.50

	B	C	D
100	CHARGE DESCRIPTION	Total Cases	\$ Amount Paid
101	Firearm Serial No., Deface or Received W/Defaced	2	6,491.00
102	OIU Drugs/Liquor & Serious Injury	3	5,760.40
103	CAUSING A FALSE FIRE ALARM	17	5,625.20
104	WANTON DEST. OF PROP., \$250 OR LESS	18	5,360.20
105	LARCENY OF PROPERTY \$250 OR LESS UNDATED	15	5,171.00
106	OP. UNDER THE INFL. OF DRUGS, 2ND	8	5,143.80
107	A&B On Retarded Person	4	4,990.00
108	OP. M/B UNDER INFLUENCE OF LIQ.	5	4,880.00
109	Firearms, Carry With Ammunition	6	4,871.60
110	DISTURBING THE PEACE, SUBSQ.OFF.	7	4,855.00
111	DEFRAUDING A COMMON VICTUALLER	17	4,738.60
112	EARNINGS OF PROSTITUTION	3	4,722.00
113	CONCEAL/HARBOR FLEEING CHILD	5	4,566.20
114	IMPERSONATING POLICE OFFICE	8	4,479.40
115	LARCENY OF A CREDIT CARD	13	4,210.00
116	Improper storage firearms	7	3,830.00
117	KIDNAPPING OF MINOR BY RELATIVE	5	3,463.40
118	ATTACHING PLATES TO M/V	16	3,365.00
119	A&B for purpose of intimidation	4	3,357.40
120	DEFRAUDING AN INNKEEPER	12	3,349.00
121	Electric Stun Gun, Sell, Possess	12	3,210.00
122	MAKING OBSCENE TELEPHONE CALLS	5	3,110.00
123	COUNTERFEIT MARK, DISTRIBUTE 1st, 2nd and up to \$9,999	1	2,925.00
124	INHAL TOXIC SUBSTANCE, ETC.	12	2,905.00
125	DISGUISE TO OBSTRUCT JUSTICE	11	2,867.60
126	ILLEGAL POSS. OF CLASS D, SUBSQ	9	2,825.40
127	OP. AFTER LIC/REG REVOKED	9	2,802.80
128	RECEIVING STOLEN CREDIT CARD	9	2,669.00
129	Shoplifting by Price Tag Tampering \$100+ or 3rd OFF	7	2,660.00
130	POSSESSING MV W/ALTERED NUMBERS	2	2,650.00
131	ILLEGAL POSS. CLASS C SUBSQ.	5	2,635.00
132	RACING A MOTOR VEHICLE	6	2,615.00

	B	C	D
133	CHARGE DESCRIPTION	Total Cases	\$ Amount Paid
134	COMMON LAW CRIMES	6	2,403.90
135	FRAUD INS. CLAIM-MV	3	2,250.00
136	CRIM CONTEMPT PROB CT	7	2,200.00
137	ENTICING TO UNLAWFUL SEX INTERCOURSE	4	2,134.40
138	FAILING TO RETURN LEASED M/V	4	1,926.20
139	ALLOWING IMPROPER PERSON OP. M/V	6	1,760.00
140	PRISONER VANDALIZE JAIL/HC PROPERTY	3	1,725.00
141	WIRETAP, UNLAWFUL OR ATTEPMT	5	1,630.00
142	OUI Liquor & Serious Injury & Negligent	2	1,610.00
143	BB GUN/AIR RIFLE, DISCHARGE ON WAY c269 12B	1	1,385.00
144	UTT STATE LOTTERY TICKET	2	1,365.00
145	HOAX DEVICE/SUBSTANCE, POSSESS/TRANSPORT/USE	3	1,320.00
146	INJURE PROPERTY AT MCI	6	1,294.60
147	SHELLFISHING CONTAM AREA NO PERMIT	1	1,285.00
148	RAILROAD TRACK, WALK/RIDE ON c160 218	4	1,281.00
149	NONSUPPORT OF ILLEGITIMATE MINOR CHILD	2	1,254.00
150	OTHER M/V VIOLATION	1	1,247.80
151	NON-PAYMENT OF WAGES	3	1,230.00
152	INPATIENT COMPT EVAL	6	1,210.60
153	FALSE/SILENT 911 CALL c269 14B	5	1,115.00
154	CORRECTIONAL INSTITUTION, DISTURB c268 30	2	1,070.00
155	INJURY TO SCHOOLHOUSE	6	1,035.00
156	DISBARRED/UNAUTHORIZED ATTORNEY SOLICIT BUSINESS	1	955.00
157	UNATUHORIZED REPRODUCTION AND TRANSFER OF SOUND RECORDINGS	2	910.00
158	BB GUN/AIR RIFLE, MINOR POSSESS OR DISCHARGE c269 12B	4	890.00
159	BREAKING GLASS IN A BUILDING	4	875.00
160	Child Endangerment While OUI	2	780.00
161	OBTAINING MV FROM LESSOR BY FRAUD	2	770.00
162	TRANSFER/ALTER/DEFACE LIQUOR ID	5	765.00
163	UNEMPLOY INSUR VIOLATION	4	764.00
164	PULL FALSE ALARM ETC.	3	700.00
165	SPEED WHILE OPER. A M/B	1	642.00

	B	C	D
166	CHARGE DESCRIPTION	Total Cases	\$ Amount Paid
167	COMPUTER SYSTEM, UNAUTHORIZED ACCESS TO	2	600.00
168	POSSESS/SELL/EXPLODE FIREWORKS	3	590.00
169	Possession of firearm (ONLY) in school building/grounds	1	547.20
170	ARMED ent wo break, night, dwell int Fel	1	535.00
171	DRUG PARAPHERNALIA	2	525.00
172	Shoplifting by Container Switching \$100+ or 3rd OFF	2	445.00
173	UNAUTHORIZED USE OF A MOTOR BOAT	2	440.00
174	ATTEMPTING TO RESCUE A PRISONER	1	420.00
175	FAILING TO STOP FOR POL OP M/V	2	415.00
176	DISRUPTION OF COURT PROCEEDING	2	405.00
177	SOLICITING FOR PROSTITUTE	5	400.00
178	CPSL From District Court	1	360.00
179	CARJACKING	2	355.00
180	OP. A MV WITHOUT LICENSE IN POSSESSION	2	330.00
181	HOUSE OF ILL FAME	1	290.00
182	suseq poss firearm,rifle,shotgun,ammuni. no ID card	1	255.00
183	FALSE REPRES. TO DPW TO SEC. SUP.	1	250.00
184	ABANDONMENT OF CHILD-CRIMINAL	2	195.00
185	OPEN CONTAINER-ALONE MINOR ONLY-OK ADULT WITH OTHER CHARGES	2	170.50
186	TAKING, ETC. LOBSTER POTS	1	125.00
187	THROWING GLASS ONTO PUBLIC WAY	1	120.00
188	INJURY BY FIRE-NEGLIGENT USE	1	95.00
189	WITHDRAWAL OF BAIL REVIEW PETITION	1	78.00
190	Rifle/Shotgun Without Serial No., Sell	1	72.00
191	INIT COMPENT EVALUATION	2	65.00
192	EVAL OF NGI OR NOT COMP. DEF	2	55.00
193	ARMED break,ent,mv, boat,build,day int Fel	1	50.00
194	TOTALS	43,757	\$ 17,355,893.60

Appendix G

Commissioner of Probation Suggested Statutory Changes
2 February 2012

Commissioner of Probation Suggested Statutory Changes

Suggestions as to any statutory change, proposed changes to indigency legislation:

- A) In Chapter 211D, amend Section 2 (A) by adding the language “the Chief Probation Officer and/or his/her designee shall sign the final report certifying that the person for whom counsel was appointed.....”.

Rationale

This language change would give the Chief Probation Officers additional flexibility, especially in busy courts and/or multiple court settings to get the final reports signed.

- B) Modify the language that requires reassessments be done every six months to now require that only one six month reassessment be conducted.

Rationale

This will eliminate the unnecessary and repetitive indigency verification checks which do not result in any additional cost savings.

Proposed new language

- C) “There shall be a committee comprised of the following individuals” 1) Chief Counsel of the Committee on Public Counsel Services and/or his/her designee; 2) the Commissioner of Probation and/or his/her designee; 3) the Chief Justice of the Supreme Judicial Court and/or his/her designee; 4) the Chief Justice for Administration and Management and/or his/her designee; 5) the Chief Justice of the Juvenile Court and/or his/her designee whose mission shall be to establish a new practical definition of “indigency” for the purpose of verifying asset information of those individuals for whom counsel was appointed by the court.”

Rationale

The current definition of indigency has not been revisited for many years had there are several components that need to be further defined and clarified which would be the mission of this Committee.

- D) Add a new section (j) “There shall be a committee comprised of the Commissioner of Probation and/or his/her designee, the Secretary of Administration and Finance and/or his/her designee, the Chairman of the House Post Audit and Oversight Committee and/or his/her designee, the Chief Counsel of the Committee for Public Counsel Services and/or his/her designee, the Chief Justice of the Supreme Judicial Court and/or his/her designee, the Chairmen of the House and Senate Committees on the Judiciary and/or their designees whose responsibility it shall be to study over a six-month period of time which

state agency would be best suited and equipped to perform the indigency verification functions as mandated in M.G.L. Chapter 211D.

Rationale

Based on preliminary research, other states place the Indigency Verification responsibility in non-judicial agencies and it would be prudent to have this Committee study where best to place this responsibility in Massachusetts.

Commentary

Letter, Commissioner of Probation



Massachusetts Trial Court
Office of the Commissioner of Probation
One Ashburton Place
Boston, MA 02108-1612

RONALD P. CORBETT, JR.
ACTING COMMISSIONER

TEL: (617) 727-5300
FAX: (617) 727-5333

January 30, 2012

The Honorable David P. Linsky
Chairman
House Committee on
Post Audit and Oversight
State House, Room 146
Boston, MA 02133

Dear Chairman Linsky:

Thank you and your staff for the opportunity to meet with you recently. I thought it might be helpful to supplement our discussion with some additional material.

As you know, we recognize the serious deficiencies that have characterized our past practice in the area of indigency verification, which have been amply documented. It seems to me that the only responsible reaction to such findings is to acknowledge them and commit the organization to a thorough reform process. As the Acting Commissioner of Probation, I would submit that our organization has been focusing on a "rebooting" of this process in 2011 and that we have made notable gains, but I would quickly add that our work is not over. I should stress that Jim Tansey and his staff have kindly mentioned many of these in the report and we are grateful for that acknowledgment.

The first of the attachments is a chronological list of related activities in 2011. Prominent among those are state-wide training in a new set of guidelines, consistent with the new statute, and a state-wide audit to insure those guidelines are being complied with in our local offices. I would also emphasize the completion of a 4-court pilot study to determine the degree of misrepresentation of financial standing by those applying for court-ordered counsel. The results of those two key efforts are summarized at the end of the attached "Fact Sheet".

We are pledged to complete the study with an examination of the results of the six-month re-assessment of indigency claims made by the study sample of a little over 2000 applicants. That six-month "look back" is required, as you know, by the statute. In addition, we also will work in 2012 on proposals that we hope will make the indigency verification process as cost-effective as possible.



The following attachments accompany this letter:

1. Training Memo from Acting Commissioner Ron Corbett to all Chief Probation Officers dated 1/18/2011 regarding "Update on Determining Indigency".
2. Memo from Acting Commissioner Ron Corbett to all Chief Probation Officers dated 1/28/2011 regarding new process and procedures for indigency verification.
3. Memo from Acting Commissioner Ron Corbett to all Chief Probation Officers dated 7/28/2011 regarding best practice guidelines on indigency verification.
4. Memo dated 8/17/2011 from Acting Commissioner Ron Corbett to John Dineen (State Auditor's office) regarding corrective action plan.
5. Memo from Acting Commissioner Ron Corbett dated 8/30/2011 to John Dineen (State Auditor's office) regarding updated corrective action plan.
6. Memo from Acting Commissioner Ron Corbett dated 10/5/2011 to John Dineen (State Auditor's office) regarding updated corrective action plan.
7. Filing letters from Acting Commissioner Ron Corbett dated 10/31/2011 to House and Senate Clerks' offices regarding filing MOU's with DTA and DOR.
8. Copy of signed Memorandum of Understanding (MOU) between the Acting Commissioner of Probation Ron Corbett and the Commissioner of the Department of Transitional Assistance dated 10/31/2011.
9. Copy of signed Memorandum of Understanding (MOU) between the Acting Commissioner of Probation Ron Corbett and the Commissioner of the Department of Revenue dated 10/31/2011.
10. Memorandum from Edward F. McDermott, Indigency Verification point person, dated 11/8/2011 to all Chief Probation Officers regarding new electronic access to benefit information on file at the Department of Transitional Assistance.
11. Memorandum from Acting Commissioner Ron Corbett dated 11/29/2011 to John Dineen (State Auditor's office) regarding update on indigency verification pilot court study.
12. Letters from Acting Commissioner of Probation Ron Corbett to the Chairs of the House and Senate Ways and Means Committees dated 12/16/2011 regarding compliance with the statutory mandate of outside section 176 of Chapter 68 of the Acts of 2011.

Finally, we appreciate your invitation to submit our thoughts and suggestions regarding changes in the statutory language of M.G.L. Chapter 211D section (2) and new funding possibilities. I expect to deliver those ideas to your office no later than Friday, February 3rd, if that is acceptable.

Sincerely,

A handwritten signature in black ink that reads "Ronald P. Corbett, Jr." in a cursive style.

Ronald P. Corbett, Jr.
Acting Commissioner of Probation

cc: Honorable Robert A. Mulligan, Chief Justice for Administration and Management